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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 232

BRONX BRASS FOUNDRY, INC., PETITIONER,

vs.

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF J. R. PALMENBERG'S SONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 9, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of J. R. PALMENBERG, INC., Bankrupt,

BRONX BRASS FOUNDRY, INC., Claimant-Appellant,

IRVING TRUST COMPANY, as Trustee, Appellee

STATEMENT UNDER RULE

This proceeding was begun by the filing of a petition to expunge the claim of Bronx Brass Foundry, Inc. on Jan. 9, 1934. An answer was interposed by the claimant to the objections on or about the 16th day of February, 1934.

There has been no change of parties or attorneys.

The objections came on for hearing before Hon. John E. Joyce, Referee in Bankruptcy. On June 29, 1934, an order was entered by said Referee expunging the claim of the Bronx Brass Foundry, Inc. A petition for review was filed on the 11th day of July, 1934. On the 11th day of September, 1934, Hon. Alfred C. Cox, one of the Judges of the U. S. District Court for the Southern District of [fol. 2] New York, entered an order dismissing the petition for review and approving the order of the Referee. On October 5, 1934, a notice of appeal and assignment of errors was filed by the claimant, Bronx Brass Foundry, Inc. On October 5, 1934, another notice of appeal and assignment of errors was filed by the claimant, Bronx Brass Foundry, Inc., and an application made thereon to the Circuit Court of Appeals for the Second Circuit for leave to appeal from the said order of the District Court. On October 15, 1934, the United States Circuit Court of Appeals for the Second Circuit granted the application made by the claimant for leave to appeal from said order of the District Court.

In United States District Court, Southern District of New York

In the Matter of J. R. Palmenberg Sons, Inc., Bankrupt

Proof of Debt and Power of Attorney

United States of America,
Southern District of New York, ss:

At the above District, in the County of New York, State of New York, at the date hereinafter set forth came Harry [fol. 3] Friedman residing in the Borough of Bronx, City of New York, and says:

I

A. That he hereinafter designates himself as claimant.

(or as appears below.)

B. That affiant is a member of the co-partnership consisting of himself and —— —— trading as —— —— and hereinafter designated as claimant. That said claimant does business at the place above set forth, and that affiant has subscribed the co-partnership name and is duly authorized by said firm to make, execute, acknowledge and verify this proof of debt and power of attorney.

(or as appears below.)

C. That he is an officer of Bronx Brass Foundry, Inc., a Corporation duly and legally organized and authorized to transact business. That he resides at the place above mentioned. That he is Treasurer of the said Corporation. That the seal affixed hereto is the seal of said Corporation. Said Corporation is hereinafter designated as the claimant.

II

That the above named Bankrupt was at and before the time of the filing of the petition in bankruptcy herein and still is justly and truly indebted to said claimant in the sum of $2,101.10. That the consideration of said debt is [fol. 4] a judgment in the sum of $2,085.44 entered on July 18, 1933 against the bankrupt, with interest at 4½% amounting to $15.66. That said amount is justly due and

owing. That no part thereof has been paid. That there are no offsets of counterclaims thereto. That deponent has not, nor has any person for or on behalf of said claimant, or to his deponent's knowledge or belief for the use or benefit of said claimant, had or received any security for said debt whatever. That no judgment has been rendered therefor or any part thereof, nor has any note or other evidence of said debt been received except such note or evidence of said debt, if any, as is attached to this document, except that the filing of this claim is not to be construed as a waiver of the right of the claimant to follow any of its property or proceeds thereof into the hand of whomsoever it may be, including the receiver and trustee in bankruptcy provided same was delivered through fraud or misrepresentation, or as a waiver of any other right of action or any other right than claimant has or may have against the Bankrupt, the Receiver or Trustee or any other person.

III

Said claimant hereby appoints Maxwell H. Goldstein, Esq., of No. 1440 Broadway, New York City, or their representatives and each of them, attorneys in fact, authorizing them and each of them to attend any and all meetings of creditors or adjourned meetings of creditors of the Bankrupt in any Court of Bankruptcy or before any Referee in Bankruptcy or elsewhere, and for said claimant and in the name of said claimant to vote for or against any pro-
[fol. 5] posal or resolution that may be submitted in reference to the Estate of the above named Bankrupt and in the choice of Trustee or Trustees and for said claimant to appoint such Trustee or Trustees. To accept or refuse any composition in or out of bankruptcy proposed by said Bankrupt. To receive, and collect any payments of dividends or fees or moneys due said claimant under any composition or otherwise and in general to take such action and do such acts, execute such consents for such claimant as said attorney may deem best, as fully as such claimant could do if personally present. And all powers of attorney heretofore executed by claimant in this proceeding are hereby revoked.

Bronx Brass Foundry, Inc., by Harry Friedman, Treasurer. (L. S.)

Sworn to before me this 25 day of September, 1933, said subscriber being known to me to be the person described in and who signed and swore to the above instrument and duly acknowledged that he executed the same.

(Individual Name)
Rose DeKempp, Notary Public, Kings Co.

(Verified by Harry Friedman, Sept., 1933.)

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION TO EXPUNGE CLAIM

To the Honorable John E. Joyce, Referee in Bankruptcy:

The petition of the Irving Trust Company, Trustee in Bankruptcy, respectfully shows and alleges:

1. That an involuntary petition in bankruptcy was filed herein on July 18th, 1933, and thereafter an order of adjudication was duly entered on August 10th, 1933 and the matter referred to the Hon. John E. Joyce, Referee in Bankruptcy herein, for all purposes.

2. That heretofore the Bronx Brass Foundries Inc. filed its proof of claim in the sum of $2,101.10 against this estate, which claim is on file in the office of the Referee in Bankruptcy herein.

3. That within four months prior to the date of the filing of the petition in bankruptcy herein, and while the bankrupt was insolvent and indebted to divers creditors of the [fol. 7] same class upon unsecured indebtedness provable in bankruptcy, and while knowing that the bankrupt was insolvent, said bankrupt transferred and paid over to the said Bronx Brass Foundries Inc. the sum of $1,000.00.

4. That the effect of said payments by the bankrupt to Bronx Brass Foundries Inc. was to enable said Bronx Brass Foundries Inc. to obtain the payment of a greater percentage of its debt than any other creditor of the said bankrupt of the same class and that the said payments to the Bronx Brass Foundries Inc. were avoidable preference under the

provisions of the bankruptcy act and amendments thereto and were likewise a preference under Section No. 15 of the Stock Corporation Law of the State of New York and the amendments thereto.

5. That the said Bronx Brass Foundries Inc. received the said payments aforementioned knowing or having reasonable cause to believe that the said bankrupt was insolvent or that its insolvency was imminent and that the said payments would effect a preference in violation of the National Bankruptcy Act and Amendments thereto and in violation of Section 15 of the Stock Corporation Law of the State of New York and amendments thereto.

6. That the said bankrupt has insufficient assets to pay in full its obligations and debts.

Wherefore, petitioner respectfully asks that the claim filed herein by the Bronx Brass Foundries Inc. in the sum [fol. 8] of $2,101.10, or any other claim or amended claim filed herein by said Bronx Brass Foundries Inc. be expunged on the ground and for the reason that the said Bronx Brass Foundries Inc. has received an illegal preference and for such other and further relief as may be just and proper in the premises.

Dated, January 5, 1934.

Irving Trust Company, by Joseph T. Stearns, Assistant Secretary.

(Verified by Joseph T. Stearns Jan. 5, 1934.)

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO PETITION

Bronx Brass Foundry, Inc., one of the creditors in this proceeding, for its answer to the petition:

1. Denies each and every allegation contained in paragraphs marked 4, 5 and 6.

Wherefore, Bronx Brass Foundry, Inc. requests that the petition for disallowance of its claim be dismissed with the costs of this proceeding.

Maxwell H. Goldstein, Attorney for Bronx Brass Foundry, Inc., Office & P. O. Address, 1440 Broadway, Borough of Manhattan, City of New York.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE WITHDRAWING CLAIM

SIR:

Please take notice that Bronx Brass Foundry, Inc. does hereby withdraw its claim and proof of debt in this proceeding.

Dated: New York, May 18, 1934.

Yours, etc., Maxwell H. Goldstein, Attorney for Bronx Brass Foundry, Inc., Office & P. O. Address, 1440 Broadway, Borough of Manhattan, City of New York.

To Hon. John F. Joyce, Referee in Bankruptcy, 70 Pine Street, New York City.

[fol. 11] IN UNITED STATES DISTRICT COURT

Statement of Evidence

HEARING ON OBJECTIONS TO CLAIM OF BRONX BRASS FOUNDRY

Before Hon. John E. Joyce, Referee

New York, January 26th, 1934, at 10 A. M.

APPEARANCES:

Otterbourg, Steindler & Houston, Esqrs., Attorneys for Trustee, by Mr. Sprague (Clerk).

Adjourned by consent to Friday, February 2nd, 1934, at 2 P. M.

ADJOURNED HEARING ON OBJECTIONS TO CLAIM OF BRONX BRASS FOUNDRY

New York, February 2nd, 1934, at 2 P. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for Trustee, by Mr. Rosen.
Maxwell H. Goldstein, Esq., Attorney for Bronx Brass Foundry.

Adjourned to Friday, February 16th, 1934, at 10 A. M.

[fol. 12] ADJOURNED HEARING ON OBJECTIONS TO CLAIM OF BRONX BRASS FOUNDRY

New York, February 16th, 1934, at 10 A. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for Irving Trust Company, Trustee, by Aaron Rosen, Esq.
Maxwell H. Goldstein, Esq., Attorney for Bronx Brass Foundry, Claimant.

OFFER IN EVIDENCE

Mr. Rosen: I offer in evidence six checks totaling the sum of $900, representing payments made by the bankrupt to Maxwell H. Goldstein, the attorney for the claimant.
Mr. Goldstein: No objection.

(Marked "Trustee's Exhibit 1, February 16th, 1934." Comprising six checks.)

Mr. Rosen: I think Mr. Goldstein will concede there is another check of $100, making a total of $1,000?
Mr. Goldstein: Yes, I do so concede.
Mr. Rosen: That was paid within the four months' period —that was paid within four months of the date of the filing of the petition in bankruptcy?
Mr. Goldstein: What was the date of the filing of the petition?
Mr. Rosen: July 18th.
Mr. Goldstein: Yes; I will concede that for the moment. I think it is correct.

[fol. 13] FRED F. THURSFIELD, called as a witness by the Trustee, being first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Rosen:

Q. Mr. Thursfield, will you please give the Stenographer your name and address?

A. Fred F. Thursfield; 130 Eastchester Road, New Rochelle.

Q. What is your business?

A. Salesman; general salesman.

Q. You are connected with what firm?

A. American Brass.

Q. The American Brass Company is a creditor in this estate?

A. It is.

Q. Were you in charge, in behalf of your firm, of its account with this bankrupt?

A. Yes.

Q. Now do you recall attending a conference at the office of Mr. Post, the attorney for the bankrupt, at which were present a representative from the Bronx Brass Foundry, and Mr. Goldstein, the attorney here?

A. I do.

Q. Tell us what was said there and who was there?

A. Mr. Palmenberg was there; representatives of the Bronx Brass.

Q. The claimant in this proceeding?

A. Yes; and myself.

Q. Was this gentleman, Mr. Goldstein, there?

A. Yes.

Q. And he was there, can you state, on whose behalf?

A. On behalf of the Bronx Brass Foundry.

Q. Now will you state just what took place at the meeting; what was said?

A. A statment that the Palmenberg——

[fol. 14] Mr. Goldstein (interposing): Pardon me; may I interrupt a moment? What date was this, did you say, it took place?

The Witness: Early in March; probably the first week in March, 1933.

Q. And what was said at that time?

A. A statement was made that the Palmenberg concern was bankrupt.

Q. Who made that statement?

A. I think I made that statement myself.

Q. And what was said after that?

A. That if an extension was granted, we believed it could be worked out. The meeting was called for the purpose of consulting with the largest creditor, outside of ourselves, which happened to be the Bronx Brass Foundry.

Q. Were there any figures submitted at that meeting?

A. As I recall it, figures were submitted, which I had.

Q. Well, do you have those figures with you now?

A. I have.

Q. May I see them, please?

A. (Witness produces paper).

Q. The paper that you have just handed me, was that given to anybody on behalf of the Bronx Brass Company at the meeting that was attended, concerning which you just testified?

A. Not that I recall. I know those figures were discussed at that meeting.

Q. The figures contained on this paper were discussed at that meeting? All of them were read off?

A. I cannot state positively on that; but they were discussed to the extent that the question of Palmenberg's claim [fol. 15] was gone into—that is, money advanced by Palmenberg to the company.

Q. What was mentioned in respect to Mr. Palmenberg's claim?

A. That my company had investigated and was confident that it was legitimate and represented actual money put into the business.

By Mr. Goldstein:

Q. Who said that, Mr. Thursfield?

A. I said that myself.

Q. You said that?

A. Yes.

By Mr. Rosen:

Q. Did Mr. Palmenberg mention the amount of his claim against his estate?

A. I think he did. I am not positive about it.

Q. Approximately what did he say was the amount of his claim?

A. $20,000.

Q. Was anything said by Mr. Palmenberg to the effect that he would subordinate his claim in the event that there was an extension?

A. Yes, sir.

Q. Well, what was said along those lines?

A. That he would subordinate any claim of his, or his family, provided an extension was granted or entered into by the creditors, so that the merchandise creditors would have preference.

The Referee: Sustained.

Mr. Rosen: I ask that it be marked for identification.

(Paper marked "Trustee's Exhibit 2 (Id.), February 16th, 1934." Comprising two sheets.)

[fol. 16] Q. Mr. Thursfield, will you state as best as you can recall, to what extent the figures referred to in Trustee's Exhibit 2 for Identification, were discussed or shown?

Mr. Goldenstein: I object to that as calling for a conclusion.

The Referee: Have him state what was said.

The Witness: There was a general discussion of the financial condition. As to just how detailed it was in regard to particular items. I would not attempt to say.

Q. Well, what was finally said in respect to the extension requested by Mr. Palmenberg in behalf of the bankrupt?

A. That they were not willing to enter into any extension until they further investigated the matter.

Q. Who was not willing?

A. The Bronx Brass Foundry.

Q. Well, what was said by the Bronx Brass Foundry at that time?

A. That they wished to investigate the claim of the Palmenberg people before they would come to any conclusion.

Q. And what happened after that meeting?

A. A committee was appointed——

Mr. Goldstein: I object to anything that happened after that meeting unless it appears that conversations were held——

The Referee: Yes; you will have to show knowledge by the claimant.

Q. Did you have any further conversation with Mr. Gold- [fol. 17] stein in respect to this matter at any time?

A. None other than immediately after the meeting, when he discussed with me the question of the Palmenberg claims, to some extent.

Q. And what did he say?

A. That he wished to look up the will of Mr. Palmenberg's father and go into the matter of how this money was advanced.

By the Referee:

Q. Now, Mr. Thursfield, will you state the substance of the entire conversation you had with Mr. Goldstein following this meeting of creditors, and recall all that you can?

A. There was a suggestion made that we, as the largest creditor take over——

Q. Well, just state all he said. Do not tell us what was suggested.

A. He asked us to take over the claim of the Bronx Brass Foundry.

Q. What did you say?

A. I said no.

Q. What did he say then?

A. As far as I recall that ended the conversation.

Q. You had no further conversation with him at that time?

A. No.

The Referee: All right.

By Mr. Rosen:

Q. Now, did you have any conversation subsequent to that meeting, with Mr. Goldstein or anybody else of the Bronx Brass Foundry, in respect to this matter?

A. No.

Q. Were there any meetings of creditors' committees, that were attended by Mr. Goldstein or anybody else on behalf of the Bronx Brass Foundry?

A. Not that I recall.

Mr. Rosen: Your witness.

[fol. 18] Cross-examination.

By Mr. Goldstein:

Q. Mr. Thursfield, will you tell us what was said, if anything, by Mr. Post and Mr. Palmenberg and Mr. Shapiro at this conference or meeting as you describe it, which took place in the early part of March, last year?

A. Mr. Palmenberg stated that he would subordinate the claims of the family; and that was substantiated by Mr. Post, provided the——

Q. (Interposing:) Tell us what Mr. Post said?

A. In what respect?

The Referee: In any respect.

Mr. Rosen: Your best recollection, I think; you don't have to remember the exact words.

The Referee: No; State the substance of what was said, as you can recall it.

The Witness: The substance was that they, Palmenberg—the Palmenberg interests, would subordinate their indebtedness, to the Palmenberg Company if an arrangement was worked out among the creditors for an extension; and that until such time as the creditors were paid in full, no payments would be made against any of their claims.

By the Referee:

Q. Now, was there anything else said? Do you recall anything said by Mr. Post? That is the question.

A. Well, that statement was also made by Mr. Post; and there was some discussion as to the length of time of an extension that would be required; and as I recall it, they thought a six months' extension would be sufficient.

[fol. 19] By Mr. Goldstein:

Q. Was anything said by Mr. Palmenberg at this meeting?

A. Well, other than I have just stated?

Q. Yes; you have related conversations without identifying the person who spoke. I want to know whether Mr. Palmenberg said anything?

A. Both Mr. Palmenberg—Mr. Palmenberg substantiated that statement which was made by Mr. Post.

Q. About what he would do concerning subordination; is that it?

A. Yes.

Q. That is all Mr. Palmenberg said?

A. He also answered your request as to the filing of his father's will.

Q. Did Mr. Shapiro say anything; the vice president?

A. There was also a statement made about some of the creditors having signified a willingness for an extension, or a willingness to enter into an extension.

Q. Did Mr. Palmenberg discuss the assets of J. R. Palmenberg's Sons?

A. There was some discussion at that time of a contract which I believe they had just got from one of their large customers.

Q. For how many thousands of dollars?

A. As I recall it, something around 14, 15 thousand; somewhere in that neighborhood.

Q. It was not forty thousand?

A. Forty? No.

Q. Was there a discussion about a $20,000 profit on the contract?

A. No.

Q. That is your recollection?

A. That is my recollection.

Q. Well now, have you told us everything that was said [fol. 20] by Mr. Palmenberg concerning the assets of the company?

Mr. Rosen: Everything that he remembers.

A. As far as I recall, yes.

Q. Have you told us everything that was said by Mr.—the vice president, Shapiro, on the subject of the assets of the company?

A. I do not recall what he had to say in that respect.

Q. Now did Mr. Post say anything concerning the assets of the J. R. Palmenberg's Sons corporation?

A. Well, he discussed about their being—having been cut into very extensively because of the loans that had been made to keep the business going; if that is what you mean.

Q. Loans made to whom?

A. Loans made by Palmenberg to the Palmenberg Company.

Q. And you say he said that that cut into the assets of the company?

A. They had reduced the assets—the quick assets, yes.

Q. Loans made by Palmenberg to the corporation had reduced the assets of the corporation?

A. Well, it had decreased the value, had it not?

By the Referee:

Q. What was said by Mr. Post in respect to the statement you just attributed to him: That the Palmenberg loans had cut into the assets. What was the substance of his statement?

A. The substance of his statement was that because of these loans which had been made by Palmenberg to the company, that there was not the value to the assets that there would have been had the business been conducted without [fol. 21] these loans. Because of these loans, there was less in the assets to the creditors—for the creditors, because they had to consider these loans.

By Mr. Goldstein:

Q. That is your recollection of what was said, is it?

A. Yes.

Q. Well, now, have you told us everything that was said by everybody who was there, as far as your recollection serves you now, Mr. Thursfield?

A. I believe there was a statement made by one of your clients, that this money had been guaranteed to him by Mr. Shapiro—or payment for merchandise had been guaranteed by Mr. Shapiro; something to that effect; or otherwise they would not have shipped it; but that I cannot be positive of.

Q. Have you searched your recollection now in telling us everything that was said about the assets of the firm?

A. I do not recall anything else that was said.

Q. All right. Now when did you receive this paper marked Trustee's Exhibit 2 for Identification?

A. I received that in March—in February.

Q. Had it been prepared by somebody you employed or your firm employed?

A. No; it had been prepared by their accountant.

Q. Had your firm, or you, ever received a copy of any statement ever made prior to that date by J. R. Palmenberg's Sons, Inc.?

A. We had never had a statement until in February of that year.

Q. You mean the statement which is marked as Trustee's Exhibit 2 for Identification, this paper (indicating)?

A. Yes.

Q. That is the first time you saw a statement?

[fol. 22] A. That is the first time we had a statement from Palmenberg's was when we got one in February.

Q. Now your recollection is clear, isn't it, that my clients and myself were not shown this statement, this paper marked Trustee's Exhibit 2 for Identification?

A. You were shown figures which we had. Whether they were those particular figures or the figures on this brown paper, I am not sure (indicating another paper).

Q. Well, let us see your brown paper, Mr. Thursfield?

A. (Witness hands counsel paper.)

Q. Now you have handed me a paper which is marked "J. R. P. Son's, Inc., Balance sheet as of March 1, 1933."

A. Yes.

Q. Is that the paper——

A. (Interposing:) Those are the figures that we had.

Q. Now, did you show that to me, or to Mr. Friedman, or Mr. Federov or anybody else, at this conference in Mr. Post's office?

A. As I recall it, those figures were there and the items were discussed.

Q. Did you show it to anybody?

By the Referee:

Q. Did you show them the paper that you have just handed to counsel?

A. My recollections are that I did.

By Mr. Goldstein:

Q. Whom did you show that to——

Mr. Goldstein: Let me interrupt one moment. Will you have this marked for identification?

The Referee: Mark it for identification.

[fol. 23] (Paper marked "Claimant's Exhibit A (Id.) February 16th, 1934.")

Q. Whom did you show Claimant's Exhibit A for Identification at this conference?

A. You saw those figures.

Q. Did you show this paper marked Claimant's Exhibit A for Identification to me?

A. I don't know that I handed it to you; but I quoted from figures that were in it, about the Palmenberg claim.

Q. You want us to understand that you talked at this conference, and you were the only one that talked about figures; is that it?

A. No; I won't say that.

Q. Well now, referring to Claimant's Exhibit A for Identification again, you want the Court to understand that what occurred was, that you discussed with those present at this conference, figures which happened to be in this report; is that it?

A. There was some discussion of figures, yes.

Q. You did not show this to anybody, did you?

A. To the extent of perhaps handing it to you?

Q. Did you hand this to me, or to anybody else?

A. No; but nobody asked for it.

Q. That is all we want to know.

A. You saw the figures there.

Q. Now you had two papers, two statements before you when you attended this conference at Mr. Post's office, didn't you?

A. I don't say that we had the second one—probably the second one there is one that came later; but in pulling it out of the package—this is the one we had (indicating)——

Q. (Interposing:) Wait a minute, Mr. Thursfield. Let us get this straight——

A. (Interposing:) This is the one we had——

[fol. 24] The Referee: Wait a minute. They have to be identified, Mr. Thursfield.

Q. You mean this yellow sheet, marked Claimant's Exhibit A for Identification, may not have been in your possession at that conference (indicating)?

A. Yes, that was in my possession.

Q. What about Trustee's Exhibit 2 for Identification? Was that in your possession (indicating)?

A. That might not have been, no. I thought when I first looked at it, that it was a copy of the others; but it is not.

Q. Well now, what makes your memory straight on these two exhibits, Mr. Thursfield—what did you just do to help your recollection?

A. I had them pinned together here—these statements were pinned together here.

Q. Without looking to see whether there was any variation between the statements?

A. What?

Q. Without looking to see whether there was any variation between the statements with respect to assets?

A. I have not been over these statements——

Q. (Interposing:) Did you do it just now, I mean?

A. No.

Q. Had you any memorandum there which helped you refresh your recollection as to whether these statements were present in your possession at that conference?

A. That one on the yellow paper was.

The Referee: That is Exhibit A for Identification?

The Witness: Exhibit A was.

Q. In your possession?

A. Yes.

[fol. 25] Q. Now what did you look at now that you have before you, that helped to refresh your recollection as to what you had?

A. Both of these papers were attached to a letter here, written on February 23rd.

Q. Written by whom to whom?

A. By myself to my company.

Q. I see. Did that help to refresh your recollection?

A. What?

Q. (Question repeated.)

A. No.

Q. But looking at it enabled you to tell us now that one of these papers was in your possession at the meeting?

A. It absolutely was. We had these brown figures before the meeting.

Q. Do you recall whether Mr. Post, Mr. Palmenberg, Mr. Shapiro or anybody else gave a detailed statement to my client, the Bronx Brass Foundry, or to me, at this conference?

A. I do not think they did.

Q. It was discussed at this conference, was it not, the purpose of J. R. Palmenberg's Sons to continue in business; was it not?

A. Yes.

Q. And complete contracts which they had on hand?

A. Yes, sir.

Q. And they asked the creditors not to press them; is that it?

A. They asked creditors not to press them, yes.

Q. Was it also discussed at this meeting, or mentioned, that there were lots of moneys due to J. R. Palmenberg's Sons that were due from customers in the West and in the Middle West, where banks had been closed?

A. Not to my recollection—I would say no.

Q. You were going to say "From my recollection"—what was it?

[fol. 26] A. I said, not to my recollection was there any discussion of moneys, or any considerable moneys.

Q. Wasn't there anything said about how much of accounts receivable there were?

A. The amount of accounts receivable was mentioned.

Q. And wasn't there something said concerning these accounts receivable; that some were unable to pay and they were unable to collect, because banks had been temporarily closed?

A. Yes.

Mr. Goldstein: That is all.

Redirect examination.

By Mr. Rosen:

Q. Mr. Thursfield, I recall you testifying before that mention was made that Palmenberg's was broke and that they wanted an extension; is that correct?

A. Yes.

Q. There is not any doubt about that?
A. There is not any doubt.

The Referee: He stated that.

By Mr. Goldstein:

Q. Who said that Palmenberg's was broke?
A. I said that.
Q. Nobody else did at this conference, did they?
A. I said that in our opinion——
Q. (Interposing:) I asked you whether anybody else said it?
A. I don't know that they used the same words, no.
Q. Did anybody else say that in words or in substance?
A. I would think from——
Q. (Interposing:) No; yes or no, please?

Mr. Rosen: What you recall.

[fol. 27] By the Referee:

Q. Did anybody say that——
A. (Interposting:) No; not in the same words or substance.

Mr. Goldstein: All right; that is all.

Q. Did the Bronx Brass Company or any of its representatives ask you for any figures on any item?
A. Any specific figures?
Q. Yes.
A. No.

The Referee: All right.

By Mr. Rosen:

Q. You stated before that you made a statement in respect to your opinion that they were broke?
A. Yes.
Q. Now who did you make that statement to?
A. It was made in the meeting.
Q. By you?
A. By me.
Q. And did you state what your opinion was based on?
A. On the fact of the moneys that were due to Palmenberg—the Palmenberg family; and the fact that their state-

ment showed a loss for the previous years; and the figures which were submitted to us had shown a loss over previous years.

Mr. Rosen: That is all.

By Mr. Goldstein:

Q. Did you state that as the basis for your opinion at this conference?

A. As I recall it, I did.

Q. You had looked at the statement which had been marked as Claimant's Exhibit A for Identification, before you came to the meeting, hadn't you?

A. Yes.

[fol. 28] Q. And that had not shown that the bankrupt—that J. R. Palmenberg's Sons was bankrupt at the time, had it?

A. In our opinion, it did.

Q. Did it show by the statement, I asked you?

A. By the statement?

Q. Yes?

The Referee: Wait a minute. He answered that question. He said, "In our opinion, it did."

Mr. Goldstein: I asked what the statement showed.

The Referee: You asked him whether or not the statement showed.

Mr. Goldstein: Exactly.

The Referee: And he said "In our opinion it did."

Q. Now I press the question again and ask you: Did the statement show that the company was insolvent?

Mr. Rosen: I object to the question. It has been answered.

The Referee: Sustained.

Mr. Goldstein: Exception.

The Referee: The statement will speak for itself.

Mr. Rosen: I will consent to the statement going into evidence.

Mr. Goldstein: I have not any objection.

The Referee: Put it in.

Mr. Goldstein: Of course it is understood by my agreeing to this, that I do not agree that it is true, nor do I acknowledge that we saw it.

[fol. 29] (Statement heretofore marked Claimant's Exhibit A for Identification, received in evidence and marked "Trustee's Exhibit 3, February 16th, 1934.")

Q. Did your company continue to do business with the Palmenberg Company after this conference?

A. We did.

Q. I beg your pardon?

A. We agreed to fill an order which we received.

Q. Were you paid for that order?

A. No, sir.

Q. When did you deliver your goods?

A. There were some deliveries made—some of them had been made just prior to that; and there was a shipment made, as I recall it, about the 10th of March, which completed it.

Q. Had you received any payments from Palmenberg's after this conference?

A. Not after that conference, nor before it—immediately before it. The thing that brought it up was——

Q. How much did you say Palmenberg's was indebted to your company at the time this conference was held?

A. Between $4,000 and $5,000.

Q. Was that what you said at the meeting?

A. As I recall it, it was.

Q. Did you say that it was about $10,000, at the meeting?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You are positive about that?

A. Absolutely.

Q. That is the one thing you have a definite recollection about?

A. Because they never owed us that amount of money.

Mr. Goldstein: You may proceed.

[fol. 30] By the Referee:

Q. Were there any other creditors present at this meeting besides your company and the Bronx Brass Company?

A. There was another creditor that came in before we left Mr. Post's office.

The Referee: All right.

The Witness (continuing): I do not know that he was there at the start of the meeting.

By Mr. Rosen:

Q. Mr. Thursfield, you testified that you made shipments to fill an order after the statement by you that the company was bust, bankrupt. How do you account for that?

Mr. Goldstein: I object to that; his reason.
The Referee: Sustained.

Q. Was any statement made at the meeting that you were going to ship or fill that order?

Mr. Goldstein: I object to that as leading.
The Referee: I will allow it. It is redirect examination.
Mr. Goldstein: Exception.

A. I do not think it was discussed.

Mr. Rosen: That is all. Mr. Post, will you take the stand please?

[fol. 31] Walter L. Post, called as a witness by the Trustee, being first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Rosen:

Q. You are an attorney, Mr. Post?
A. Yes.
Q. Practicing for how many long years?
A. Twenty-five.
Q. You are also an officer of the bankrupt company?
A. Yes.
Q. What officer?
A. Secretary.
Q. And besides being an officer, you are active as their counsel; isn't that correct?
A. Yes.
Q. Did you personally attend the meeting that was held at your office some time in March, 1933, in respect to this matter?

A. It was either the end of February or the first of March; it was about the first of March.

Q. And do you recall who was present at that meeting?

A. Mr. Thursfield, Mr. Goldstein and two officers of the Bronx Brass Company; I cannot recall their names, just now.

Q. By Mr. Goldstein, you refer to this gentleman? (Indicating Maxwell H. Goldstein).

A. Yes.

Mr. Goldstein: Federov and Friedman are the names.

The Witness: That is right; Mr. Federov and Mr. Friedman; Mr. Maxwell Goldstein; Mr. Palmenberg, Mr. Shapiro and I. I mentioned Mr. Thursfield, didn't I?

Q. Yes, you did.

A. And later during the session, Mr. Landes, who was a [fol. 32] creditor having supplied coal, came in; but I think it was about an hour after we started in.

Q. Now, will you state as best as you can recall it, just what transpired at that meeting; what was said, and who said it, and everything else?

A. Why, we told them that the company had come to the point where it was not able to pay its way; that Mr. Palmenberg and members of his family had, for several years met financial stringency by making loans to the company; and because of the fact that he was pretty well out of liquid assets, his money was tied up in mortgages and in real estate, upon which he could not realize, that it was impossible for him to continue to advance money to the company. We explained that his mother had put in a certain amount and that his grandmother had put in $7,500. We said that we felt that the firm of Palmenberg's which had been in existence for eighty years and was very well regarded amongst its creditors, could pull through; that we were right in the beginning of the season for 1932; that we felt optimistic——

Q. (Interposing:) 1933.

A. 1933, yes—that we felt optimistic of business—future business; we had succeeded in getting an order from a large concern in the West, amounting to about $14,000, I think, which we felt indicated a prospect of future business; and that we had explained the situation to our largest creditor, which was the American Brass Company; we were indebted to them to the extent of about $4,500; that

Mr. Palmenberg had been to Waterbury to confer with them, and to explain the situation to them, and that Mr. Thursfield, as their representative, had been allowed full access to our books and had gone over the books and was [fol. 33] there prepared to explain anything, from the creditors' standpoint. We had a statement there—a recent statement, showing what the assets were; and we discussed that with Mr. Goldstein—I do not think his clients took very much part in it; he discussed it. The statement showed a machinery valuation—machinery and moulds, of around $50,000; and inventory of raw materials of about $30,000. It showed an item of good will there, which I explained had no real value behind it: $400,000.

Q. $400,000?

A. $400,000.

Q. And you stated that it had no real value behind it?

A. That it had been carried on the books; and we had discussion that that had at one time represented patents and trade-marks that had no longer any value.

Q. Were the liabilities mentioned?

A. We discussed the liabilities; and I said that the Palmenberg family had put in somewhere around 230—$240,000; that they were willing, if the creditors would work along and grant an extension of time, they were willing to subordinate this claim so that the merchandise creditors would come out first. There was just a general discussion of figures of the company.

Q. Was there anything stated about the company being insolvent or bankrupt or unable to continue?

A. I do not recall that those words were used. We said that we could not continue unless there was a definite extension of time for a period from the creditors; but we assumed that the figures which were before us all spoke for themselves, that the company was insolvent as shown by the statement.

[fol. 34] Mr. Goldstein: I move to strike out the last part of the answer.

(Answer read.)

The Referee: Strike out what he assumed.

Q. What happened after that meeting, Mr. Post?

A. A copy of the statement which we had there, which had been prepared by the accountant for the company, Mr.

Schmelkin, was furnished to Mr. Goldstein, at his request. He also wanted the past three years' statements, operating statements and statements of the company, covering the past three years; but they were not furnished to him.

Q. Did you prepare an extension agreement?

A. Well, I had several talks with Mr. Goldstein about this——

Q. (Interposing:) Well, will you state what those talks were, please?

A. Generally urging him to agree to an extension for some period of time, or to the general extension of his indebtedness.

Q. And what did he say?

A. And for, oh, several days, he was rather undecided as to what could be done. He said that his clients had not dealt very long with the Palmenberg's Company and they felt that they were entitled to preference on that account, over the older creditors.

Q. Did he use that language?

A. Yes.

By Mr. Goldstein:

Q. Will you fix the time, please, of this conversation, Mr. Post?

A. I imagine, Mr. Goldstein, that it took place—that conversation or something substantially like it, took place [fol. 35] half a dozen times between the first day of March and the middle of June.

By the Referee:

Q. Where were the conversations?

A. Over the telephone and in Mr. Goldstein's offices; he was at 2 Lafayette Street, at first, and then he moved during the Spring to, I think, 1440 Broadway.

Mr. Goldstein: That is right.

Q. Well, can you say whether this particular conversation, where he said that his clients had only been dealing with the bankrupt a short time, took place at his office or over the telephone or at your office?

A. The only time that I can place definitely, my recollection is that it took place in that first meeting there in my office; but——

Q. That was the meeting at which the American Brass attended?

A. Attended; that was around March first; but I do recall the statement being made, I would fix the time about the first of June, in Mr. Goldstein's office.

By Mr. Rosen:

Q. Now, was an extension agreement definitely submitted to the creditors?

A. Yes.

Q. And did the Bronx Brass Company refuse to sign that agreement?

A. Yes.

Mr. Goldstein: Well, now, wait a minute. May I object to this——

The Referee: Fix the time and place.

Mr. Goldstein: Let us have a copy of this paper, if he [fol. 36] refers to a paper; I think the paper is the best evidence.

Q. Was suit subsequently commenced by the Bronx Brass Foundry against Palmenberg's Sons?

A. Yes.

Q. And at the commencement of that suit did you talk to Mr. Goldstein?

A. Well, you mean about the time?

Q. Yes?

A. I was in touch with Mr. Goldstein very frequently, both before and after that suit was commenced.

Q. And when that suit was first commenced, did you have a conversation, and if you did, will you state just what that conversation was?

A. Why, from time to time I urged Mr. Goldstein to get his clients to come into that arrangement; and I said, unless the creditors did come in and did grant this extension, that the company could not go on, could not continue.

Q. And it was after that suit was started—after the commencement of the suit, that the $1,000 was paid to the Bronx Brass; is that correct?

A. Yes, sir.

Q. And it was paid by postdated checks, was it not?

A. Some of them were, and some of the checks were—may I refer to my file?

Q. Yes.

A. (After reference to file) Summons was served on the company on March 15th; and between that time and April 4th, when the time to answer expired, I had several talks with Mr. Goldstein urging him to give his consent to this extension agreement. On April 4th, the time to answer was extended to the 6th, when an answer was interposed.

[fol. 37] Q. Is there anything further that you recall in respect to any conversation you had with Mr. Goldstein in regard to the payment or the financial condition of the bankrupt?

A. It is my recollection that the first payment that was made to Mr. Goldstein was made after April 12th, 1922—after April 15th, 1922, when a motion for a summary judgment was made in the action; and——

Q. (Interposing:) Did you have any conversation with Mr. Goldstein at the time of that payment?

A. There was no hearing in that. I talked to him and told him that we were meeting with considerable success in getting the creditors to come into the agreement—the extension agreement. It had been circulated and a large proportion of the creditors had accepted it and agreed to sign it. He said that——

Q. Have you a copy of the extension agreement?

A. Yes; I have it here. (Indicating paper.)

Q. Is there anything else that you recall in respect to that?

A. I think I did not finish my answer to that last question. I then talked to Mr. Goldstein and he said that he would not consider this extension agreement until his account had been reduced further, or his clients' account; and that he was going to press this action unless he received some payments. Payments were commenced, I think right after that, and were made to him; and from time to time, as a payment was made on account of the agreement—on account of the debt, the motion for a summary judgment was adjourned.

Q. Now, Mr. Post, do you know of your own knowledge whether the bankrupt company at the time of the meeting in March was able to meet maturing obligations?

A. It was not.

[fol. 38] Q. Current liabilities were accruing and they did not have any current assets to pay it; is that correct?

A. Right.

Q. And was that fact mentioned?

A. Oh, yes; that was the reason we were asking for the extension.

Mr. Rosen: All right, that is all. Your witness.

Cross-examination.

By Mr. Goldstein:

Q. Mr. Post, have you got the paper with you which you say you quoted from in giving figures concerning the assets and liabilities of Palmenberg's Sons?

A. No, I have not. I do not know just which one of the statements prepared by the accountant was used.

Q. Was any statement shown to anybody there on behalf of my client or myself?

A. Yes.

Q. What statement was that?

A. A statement prepared by Mr. Schmelkin, the accountant, about the first of the year 1933. I would say that it had the same figures that are on that white sheet Mr. Rosen has (indicating paper).

Q. Have you got that paper here?

A. I have a duplicate of that paper.

Q. I ask you if you have the paper which you say you showed to my client and me, at this conference in your office in the end of February or the beginning of March?

A. I am unable to definitely recall just what paper or just what statement it was that we had at that time.

Q. As a matter of fact, weren't you asked to give a statement to them?

A. A statement for the three year——

[fol. 39] Q. (Interposing:) No; of the assets and liabilities of the company as they were then?

A. Yes.

Q. Did you give it?

A. Yes.

Q. Well, was it in writing or was it orally?

A. It was a copy, I believe, of that white paper Mr. Rosen has.

Q. Did you give me a copy, or my clients a copy of it, Mr. Post?

A. I believe it was mailed to you.

Q. Have you got any memorandum in your file which will make definite the statement which you now make, Mr. Post?

A. No; there is no letter that I have here covering it; but it was either handed to you or mailed to you a day or so later.

Q. After the conference, you say?

A. Either that same day or the next day.

Q. Well, will you describe that paper please, so we will know what it was that you say you handed to me?

A. The paper I am talking about I believe is a duplicate of—may I have that, Mr. Rosen, please?

(Mr. Rosen hands Mr. Post a paper.)

The Witness (continuing): Is a duplicate of Trustee's Exhibit 2 for Identification.

Q. And you say you gave me a copy of it, sir?

A. Either gave it to you or it was mailed to you that day or the next day.

Q. Well, is there anything that you have in your files with you which will help to refresh your recollection now as to which it was?

A. No.

Q. Nothing at all?

A. No; I do not recall. I remember it being furnished to you, but I do not remember how.

Q. Now, Mr. Post, coming back to this meeting at your [fol. 40] office, did you or anybody there say in words or in substance that the Palmenberg Company was bankrupt?

A. No; except that we stated that it could not meet its obligations; but the word "bankrupt" was not used.

Q. You did not say that the company was insolvent?

A. We said it was unable to pay its bills.

Q. I asked you whether you said it was insolvent?

The Referee: In those words.

A. We did not use those words.

Q. Did you discuss the assets and liabilities of the company?

A. We did.

Q. And did you attempt to show by the discussion of those assets and liabilities, that the company was solvent?

A. We said that the solvency of the company depended entirely upon the attitude of the Palmenberg family; that

if they pressed their obligations, that the company was unable to pull out.

Q. You mean it would be unable to pull out if they asked for it the same way as any other creditor had asked for the money; is that it?

A. Right.

By the Referee:

Q. And there was then $230,000, owing to the Palmenberg family, you say?

A. Between $230,000 and $240,000.

By Mr. Goldstein:

Q. You mean that if all the creditors had asked for the money, they would not be able to get their money when they wanted it; is that it?

A. No.

[fol. 41] Q. The company was still operating when that meeting was held, was it not?

A. Oh, yes.

Q. And it still had a bank account, did it not?

A. Yes.

Q. Now, wasn't it the purpose of your remarks to convey to my clients and to me the purpose that the firm was solvent and that if given an extension it would continue to live and pay its obligations in full?

A. No. The thing we tried to convey to the creditors was——

Q. (Interposing:) Now, there were only two creditors there, weren't there?

Mr. Rosen: I suggest you let him answer the question.

A. There were three creditors there. I don't recall whether Landes was there during the time we discussed that or not; but we made it very definite that the Palmenberg family wanted to see the merchandise creditors preferred over their claim if they gave the business a chance to pull out. We believed that business was improving; we had had quite a definite uplift in business the early part of the year and we felt that we could pull out; and at first we asked for a six months' extension; and later extended it to one year. We thought we needed a year's extension of time, and we offered, if the creditors would—if the mer-

chandise creditors would cooperate and grant that extension, we offered to subordinate the claims of the Palmenberg family—I think we did not offer to subordinate Mrs. Ordermann, Ted's grandmother's claim—well, at that time there was no offer to subordinate his mother's or his grandmother's claims; it was just Ted Palmenberg's claim entirely.

[fol. 42] Q. Well, now, I ask you again Mr. Post: Did you say in words or in susbtance that the company was solvent?

A. We explained the situation——

Q. (Interposing:) Did you say that, in words or in substance?

A. We did not use those words. Any lawyer would understand, from what we said, that the company was insolvent.

Mr. Goldstein: I move to strike that out.

Mr. Rosen: I object to its being stricken out.

Mr. Goldstein: That is an opinion, sir.

The Referee: Well, you are asking him—there may be a difference of opinion as to whether he said it is substance. Now ask him whether he said it in form.

Mr. Goldstein: What he has said is his opinion of what I might have understood.

The Referee: That is just the reason you should not ask him if he stated it in substance, because you and he may disagree on the substance or the effect of the substance.

Mr. Goldstein: That is answerable, if your Honor please, by yes or no.

The Referee: Well, ask him whether he said that in form.

Q. Did you say that in form, Mr. Post?

The Referee: That the company was insolvent.

A. I cannot definitely say so. I do not think I did. I tried very hard to keep away from that.

Q. Now, did you tell us—did you tell my clients, and did [fol. 43] you tell me, that the company was in difficulty because accounts receivable from the Middle West and the West had not been able to pay because banks were being closed and that you needed time because of that fact?

A. That was one of the reasons, yes.

Q. One of them? Wasn't that the principal reason?

A. No; there were various reasons.

Q. Now do you want the Court to understand that you told me and my clients, and if you please, Mr. Thursfield from the American Brass & Foundry Company, that this company was insolvent and you wanted the creditors to give an extension on that ground?

A. I think I have answered that I did not use the word "insolvent." I explained the facts of the company to you. You stated you were an accountant as well as a lawyer, I remember, and you said that you could understand what that meant; and we had a long discussion over the figures. I explained that it was impossible for the company to go on as it was; that it had to have an extension of time; that unless the creditors would agree to this extension of time, we would have to wind up and that there would be very little for the merchandise creditors then, because a very large proportion of the indebtedness was to the Palmenberg family; but they would subordinate that debt if the creditors played along and gave them time. Now that was the substance of our talk.

Q. You meant, if somebody filed a petition in bankruptcy then and there; is that it?

A. Certainly.

Q. Is that what you said?

A. I do not recall saying that.

Q. I see.

A. I remember discussing it with you.

[fol. 44] Q. Well now, the picture you gave of assets and liabilities showed that the company was solvent, did it not?

A. It did not.

Q. Well, what were the figures which you quoted to us?

A. The company had machinery——

Mr. Goldstein (Interposing): Let it appear on the record that Mr. Post is not looking at any memorandum now. Go ahead, Mr. Post.

Mr. Rosen: Well, will you suggest that he does look at a memorandum?

Mr. Goldstein: No, I just want the record to show that.

A. I think I am fairly familiar with the figures. I have lived with this thing for about three years.

Mr. Goldstein: All right.

A. (Continuing:) The company had machinery, which it carried on the books roughly at $50,000, machinery and fix-

tures. I know we discussed that figure and we said, "You know, if the company is wound up, that has but little value." It had accounts receivable around $15,000, $16,000. A higher figure on the books, but there was quite a large reserve carried for doubtful accounts. It had an inventory of $30,000. It had an item on the books, which had been carried I think from the inception of the company, of good will, $40,000. That, as I recall it, was the picture of the assets.

By Mr. Rosen:

Q. And what was the picture of the liabilities?

A. The liabilities was the indebtedness to the Palmenberg family of about $230,000—a little over that.

[fol. 45] Q. What else?

A. There were merchandise creditors of about $25,000. There were other creditors of, oh, $15,000.

Q. Was there accrued payroll?

A. I was just trying to think when that came in.

The Witness: At that time, it is a little hard for me to figure that in at any one particular time—at that time I think there was accrued payroll of three or four——

By Mr. Goldstein:

Q. Did you state that the item of $50,000 for machinery and fixtures was the fair value to the company as a going concern but would not be worth that much at a sale—at a forced sale?

A. I think so.

Q. Were you an officer of this bankrupt corporation?

A. Secretary.

Q. How long were you secretary, Mr. Post?

A. About two years, at that time.

Q. And how often did you attend at this place of business of Palmenberg's Sons?

A. Almost daily.

Q. And was there any substantial change in the condition of the company from January 1, 1933, until March 1, 1933?

A. A slight improvement.

Q. There was an improvement?

A. Yes.

Q. So that at the time this meeting was called at which I was present, and my clients' officers, and Mr. Thursfield, the company had shown an improvement over the statement of January 1, and that was the statement which you say you gave me a copy of (indicating)?

A. Yes; that is the one.

[fol. 46] Q. Now this statement—I ask you to look at it and tell us whether that shows the company to be solvent on January 1, 1933, or not? Whether this statement shows that (handing)?

A. I would not say so.

Q. Well, what does the statement show with respect to the value of the capital stock on January 1st?

A. The value of the capital stock shows a deficit account of $500,946.56.

Q. And that means as against a total valuation of how much?

A. $765,600.

Q. Now that produces a net value of some more than $200,000, doesn't it? Isn't that right according to that statement?

A. That is the result you get when you subtract these figures.

Q. So that the net value of the corporation on January 1st, according to that statement, was $200,000; isn't that right, Mr. Post?

A. With that explanation, that is true.

Q. And that condition had improved in March, the beginning of March, hadn't it?

A. These figures had not improved very much. The condition of the company had improved because it was a going business with——

Q. (Interposing:) Now had this company—I am sorry if I interrupted you.

A. (Continuing:) It was a going business and it looked as though it was going to go ahead and have a good season.

Q. Now Mr. Post, had Palmenberg Sons, this bankrupt corporation, made any payments to any other creditors between January 1, 1933, and March 1, 1933?

A. Yes.

Q. How much would you say was paid out between January 1, 1933, and March 1, 1933?

A. I cannot recall.

Q. Have you any idea?

A. No.

[fol. 47] Q. Now how much money was paid out by this bankrupt corporation between March 1, 1933, and the date of the filing of the petition in bankruptcy?

A. The books will show that. I do not recall.

Q. Have you any idea at all?

A. No.

Q. You know that other creditors were paid, too, between March 1, 1933, and July 15th, 1933?

A. Why yes; payments were made. I had very little to do with the actual physical payment.

Q. Now let us get this straight, Mr. Post. People continued to sell goods, didn't they, to the company

A. Yes.

Q. And continued to render monthly statements?

A. Yes.

Q. And continued to receive payments, isn't that right?

A. Some of them did. I think that the payments during that last period of three or four months, I think there was very little money that was paid out to creditors except under pressure.

Q. Well, there were others besides the Bronx Brass Foundry that were paid between that period of March 1 and July 15?

A. (No answer.)

By the Referee:

Q. Well now, are you speaking of creditors who were such on March 1st, or of creditors who extended new credit or who became creditors in the first instance after March 1st?

A. I think there were both classes. The feeling among the creditors generally was very good; though——

The Referee: Well, that is an answer.

The Witness (Continuing): They were willing to work along with us under those circumstances.

[fol. 48] The Referee: Put the question.

By Mr. Goldstein:

Q. Now, Mr. Post, I show you a letter dated May 19th, 1933, and ask you whether it bears your signature (handing)?

A. Yes.

Mr. Goldstein: I offer it in evidence.

Mr. Rosen: No objection.

(Marked "Claimant's Exhibit B, February 16th, 1934.")

Q. Did you have any conversation with me prior to sending that letter to me, Mr. Post?

A. I had several of them.

Q. Did you have one immediately preceding the sending of that letter?

A. Yes.

Q. Did you talk to me by telephone?

A. And in your office.

Q. Were you asked whether the company was solvent then?

A. (No answer.)

Q. Why the hesitation, Mr. Post?

A. Because I cannot recall. My impression is yes.

Q. I asked you whether they were solvent, didn't I?

A. Yes.

Q. And you told me they were?

A. I told you the facts as we had them there.

Q. Didn't you say that they were solvent, Mr. Post?

A. I think it was at that time I said no, that I had begun to despair pulling them through; and you said you were going to get yours; that you were going to be the dog in the manger, if necessary.

Q. You did not say that they were insolvent, did you?

A. I think I did.

Q. You said they were insolvent at that time?

A. I did.

[fol. 49] Q. And then you followed it up with the letter dated May 19th, which has been marked Claimant's Exhibit B in evidence here?

A. May I see that letter? If that is the letter, I didn't see it. (After examining Claimant's Exhibit B.) Yes; there was a stipulation made also on that day.

Q. It bears the same date, doesn't it?

A. Yes.

Q. Now does that help to refresh your recollection as to whether you said they were solvent or insolvent?

A. The more I think of it, the more I recall telling you that the concern was hopelessly insolvent and I had no hope, or very little hope to pull them out.

Q. Nevertheless you sought to obtain a delay in the payment—or the entry, rather, of a judgment on behalf of the Bronx Brass Foundry in the action in the Supreme Court——

Mr. Rosen (Interposing): I object to that.
The Referee: Sustained. It is immaterial.
Mr. Goldstein: Exception.

Q. You did say in that letter of May 19th, 1933, that you "confirmed the conversation had yesterday and that no judgment had been entered." Is that right?

Mr. Rosen: The letter is in evidence, if your Honor please,
The Referee: Sustained.
Mr. Goldstein: Exception. This is cross examination, if your Honor please.

(After discussion, off the record.)

The Referee: You may inquire as to what preceded the writing of that letter.

[fol. 50] (After further discussion, off the record.)

Mr. Goldstein: May I have an exception?

By the Referee:

Q. Did you have any conversation preceding the writing of that letter, with respect to whether there were any judgments unsatisfied of record against the bankrupt?
A. Yes, sir.
Q. With whom?
A. Mr. Goldstein.
Q. When and where was that conversation held?
A. In his office, 1440 Broadway.
Q. State what the conversation was?
A. The motion for summary judgment had been adjourned from time to time. I think it was due——
Q. Well no; just tell us what was said; never mind the background?
A. I asked him if he would not give us further time. I said that 50 per cent approximately of the creditors had agreed to come in and sign this extension agreement; he said no; that he was not willing to give further time; that he was going to press and get the money for his clients;

that was the only thing that he was interested in; and he was not going to sign any agreement. As a matter of fact, he said, I believe——

Q. What did he say about giving you a further extension on this motion?

A. He said that he would not do so. So we entered into a stipulation, which I have here. In that letter he asked me—he said, "I understand that there has been a judgment entered in favor of Palmenberg against the company." I said, "If there has been, I did not handle it and I don't know anything about it." As a matter of fact, I said, "I would not make an arrangement with you for [fol. 51] further time here if there was any judgment-creditor that was going to take any advantage of this delay." I said, "I will look it up and I will confirm it." And I did, and that letter is the result.

By Mr. Goldstein:

Q. Now Mr. Post, does that help to refresh your recollection as to whether you were asked whether they were then solvent?

A. It does, very clearly. May I see those checks? Are they in evidence?

Mr. Rosen: Yes. (Handing witness Trustee's Exhibit 1 of this date, comprising six checks.)

Mr. Post (after examining checks): You at that time refused to receive further checks unless they were personally endorsed by the officers of the company. You said that a number of checks had bounced back and that you did not think that you were going to get your money; and I said that I would not endorse any checks for the company; that I would not let Mr. Palmenberg get any deeper than he was. I put it up to Mr. Shapiro, to see what he would do. I arranged with Mr. Shapiro to come to your office; and he did so, and we finally agreed that four checks would be issued, some of them postdated, and that Mr. Shapiro would countersign—or would endorse two of them, for $100 each, and you would take the chance on the other two in getting your money out.

Q. That called for a delay of how many weeks, Mr. Post?

[fol. 52] Mr. Rosen: I think the question is indefinite. I do not know what it means.

The Referee: Delay of what? In the entry of the judgment or the stipulation?

Mr. Goldstein: In the entry of the judgment.

Mr. Rosen: I consent that the stipulation go into evidence, if your Honor please.

Mr. Goldstein: That is agreeable to me.

The Referee: Mark it.

(Paper marked "Trustee's Exhibit 4, February 16th, 1934.")

Mr. Post: May I refresh my recollection for a moment from this stipulation? (After examining Trustee's Exhibit 4 of this date.) Five weeks.

Q. Had you, in that conversation with me on May 19th, 1933, mentioned the fact that there was a confession of judgment in your possession executed by the company to T. C. Palmenberg?

A. I said there was one in existence.

Q. Did you say who had it?

A. I probably said I had it.

Q. Did I say to you, in words or in substance, that I wanted a letter from you assuring me that no judgment had been entered at that time, so that my client would not be tricked out of its money?

A. No.

Q. Did you promise to me that you would not do anything with this confession of judgment so as to avoid the payment of my client's claim?

A. I would not put it that way. I did not promise. I said that I was determined to save the company if I could and [fol. 53] that it was not my intention to file this confession of judgment until I was satisfied that I had given up all hope of saving the business.

Q. And didn't you state to me, Mr. Post, that the reason you had a confession of judgment executed by Mr. Palmenberg was that you would thereby be in a position to club any objecting creditor into submission if he did not agree to give you an extension of time?

A. I think I went further than that. I think I said it was mainly executed so as to handle you.

Q. I see; and it was for the purpose of keeping alive an insolvent concern; is that it, Mr. Post?

A. Right.

Q. And you understood that I, as an attorney, would, after hearing a statement such as you now say you made, execute the stipulation dated May 19th, 1933, and which has been marked as Trustee's Exhibit 4 in evidence; is that it, Mr. Post?

A. Will you read the question again, please? Just the first part of it. I did not quite get it.

(Question read.)

A. I so understood, and you did execute it.

Q. After you made such a threat; is that it?

A. I did not make any threat.

Q. You made the statement you say you did?

A. I stated a fact.

Q. Now Mr. Post, you the the attorney for the bankrupt here, aren't you?

A. Yes.

Q. Did you file schedules on behalf of the bankrupt?

A. I did.

Q. Is the Bronx Brass Foundry, Incorporated, among the creditors whom you scheduled?

A. I think so.

[fol. 54] Q. And you scheduled them for the balance of the debt upon which a proof of debt has been filed by the firm of Bronx Brass Foundry, did you not?

A. I think they were scheduled for the amount of the judgment they eventually entered.

Q. Yes. Well now, you knew when you scheduled those debts that the Bronx Brass Foundry, as you say, had received a preference?

The Referee: It does not make any difference, does it? It was a payment.

Mr. Goldstein: The purpose of this, if your Honor please, will be brought out in a moment, if you will bear with me.

The Referee: Yes; I will give you a chance to show me the relevancy.

Mr. Goldstein: Yes, you will have it in a moment.

Q. Did you understand it at that time, Mr. Post?

A. Certainly.

Q. Did you list the Bronx Brass Foundry among those—(withdrawn). When for the first time did you communicate with the Trustee to inform the Trustee that the Bronx Brass Foundry had received a preference, as you claim?

A. When I was asked about the facts of the payments.

Q. And when was that, for the first time, Mr. Post?

A. Why, some time during the Fall. I cannot recall now just when it was.

Q. Well, let me see if I can help to refresh your recollection. Do you remember hearing that the Bronx Brass Foundry, a creditor in this proceeding, filed an objection to the claim of T. C. Palmenberg for some $260,000?

A. I do.

[fol. 55] Q. And wasn't it the day after that claim was filed and served upon the attorney for Mr. T. T. Palmenberg, that you communicated with the Trustee?

A. No.

Q. Well, when was it before that date that you had communicated to the Trustee the information which you have now given on examination?

A. I cannot give you the date. It was, oh, three or four months ago, I think.

Q. Now, will you search your memory, please, Mr. Post, and see if you cannot tell us the exact date?

A. No, I cannot. I mean, it does not——

Q. (Interposing:) You remember writing a letter to Otterbourg, Steindler & Houston, the attorneys for the Trustee here, don't you?

A. Yes.

Q. Now, when was that letter written, concerning the Bronx Brass Foundry, Incorporated's claim?

A. About a month ago.

Q. Have you got a copy of the letter before you?

A. No; but I have it here.

Mr. Goldstein: May I have that letter, Mr. Rosen?

Mr. Rosen: Absolutely not; and I will tell you why: That is a letter containing information given to us to sustain our case, and you will be getting all our facts to object to the claim, before our case is through.

Mr. Goldstein: I offer it for identification.

Mr. Rosen: I consent that it go into evidence, if your Honor please.

Mr. Goldstein: Very well. I offer it in evidence.

(Marked "Claimant's Exhibit C, February 16th, 1934.")

[fol. 56] Q. Now, Mr. Post, look at your letter of January 15th, 1934, please (handing Claimant's Exhibit C).

A. I am looking at it.

Q. All right. Does that letter help to refresh your recollection as to when for the first time you told the Trustee, or the Trustee's attorneys, that the Bronx Brass Foundry had allegedly obtained a preference?

A. Why, it was some time prior to that letter.

Q. The letter which has been marked in evidence as Claimant's Exhibit C, does not say anywhere in it, does it, that you ever informed the Trustee's attorneys about those facts before; does it?

A. No.

Q. Strange that it would leave out such a reference, isn't it?

Mr. Rosen: I object to that.

The Referee: Sustained.

Mr. Goldstein: Exception.

Q. Now, before you wrote this letter, you had received a letter from Mr. Rosen, had you not, from the Trustee's attorneys' firm?

A. Yes.

Q. Have you got that letter?

A. (Producing letter.)

Mr. Goldstein: I would like to have this marked in evidence.

Mr. Rosen: No objection.

(Marked "Claimant's Exhibit D, February 16th, 1934.")

Q. Do you recall the day of the meeting of creditors, Mr. Post, at which the question of the fees to be paid to Messrs. [fol. 57] Otterbourg, Steindler & Houston and you, among others, was to be taken up?

A. I do.

Q. Did you talk to Mr. Rosen on that day about the Bronx Brass Foundry?

A. I do not recall.

Q. Don't you remember that the Bronx Brass Foundry, through my office, filed objections to the claim made by you and by the attorneys for the Receiver?

A. They did.

Q. And doesn't that help to refresh your recollection as to whether or not you had any discussion with Mr. Rosen concerning the elimination of the Bronx Brass Foundry as a creditor in this proceeding?

A. No; not as you put it.

Q. Well, you had some talk with him then?

A. I don't recall any talk with Mr. Rosen that day.

Mr. Rosen: Mr. Referee, I object to the word "elimination." If Mr. Goldstein is familiar with the practice, we do not want to eliminate his claim.

(After discussion, off the record.)

Q. Did you talk to Mr. Rosen that day at all, Mr. Post?

A. I don't recall any particular conversation with him on that day.

Q. Do you recall when that was done, Mr. Post?

A. I do not. It was only recently that I heard of it.

Q. Did you hear of it before your letter of January 15th was sent to the attorneys for the Trustee?

A. I don't think so.

Q. Will you search your memory a little bit more, Mr. Post?

A. Perhaps if I could be told the date when that objection was filed, it might——

Q. (Interposing:) I tell you it was filed on or about the 9th day of January, was it not?

[fol. 58] The Referee: That is the objection to the claim?

Mr. Goldstein: Of T. C. Palmenberg.

Q. It was served on the 4th of January, and filed here on the 5th. Does that help to refresh your recollection, Mr. Post?

A. No, it does not; because I am not Mr. Palmenberg's attorney in this proceeding and nothing came to my knowledge concerning it.

By the Referee:

Q. What is the date of the Exhibit to you from the Trustee's attorneys asking for information?

A. September 28th, 1933.

By Mr. Goldstein:

Q. You did nothing about your letter of September 28th, 1933, until after the Bronx Brass Foundry had filed its objections to the claim of T. C. Palmenberg; isn't that so, Mr. Post?

A. No, it is not so.

Q. Well, now, you didn't write the letter of January 15th, until January 15th, did you?

A. No.

Q. And it was on January 4th, that Mr. Adelman was served with a copy of the objections to the claim of T. C. Palmenberg; is that not so?

A. If you say so. I don't know.

Q. And on the 5th of January that original objection to their claim was filed in the Referee's office here; isn't that so?

A. If you say so.

Q. You had not done anything between September [fol. 59] 28th, 1933, and January 15th, 1934, by way of writing a letter to Otterbourg, Steindler & Houston concerning the alleged payment of a preference to the Bronx Brass Foundry, had you?

A. I had not written a letter prior to that date.

Q. And what was it that stimulated you into activity on January 28th?

Mr. Rosen: I object to that question.

The Referee: Sustained. I think the examination can end on this phase.

Mr. Goldstein: I except to your Honor's ruling.

Redirect examination.

By Mr. Rosen:

Q. Mr. Post, you say that this Exhibit, Trustee's Exhibit 2 for Identification, was given to Mr. Goldstein?

A. I am sure that is the one.

Mr. Rosen: I offer it in evidence as Trustee's Exhibit 2 for Identification.

Mr. Goldstein: I have no objection to it, in view of Mr. Post's statement that he gave it to me; which, of course, I deny.

(Exhibit 2 for Identification received in evidence as "Trustee's Exhibit 2, February 16th, 1934.")

By Mr. Rosen:

Q. Mr. Post, when cross-examined by Mr. Goldstein you stated that the Trustee's Exhibit 2 in evidence, indicated that there was a capital of some $270,000, but it was by reason of the inclusion of $400,000 of good will; is that right?

Mr. Goldstein: I object to that. It speaks for itself.
[fol. 60] The Referee: Overruled. You went into it on cross-examination.
Mr. Goldstein: Exception. I object to it also because it calls for a conclusion on the part of the witness.

A. That is the reason I said that that is the result if you look at it merely from an arithmetical standpoint.
Q. And by the elimination of the good will, there would be a substantial deficit of over $200,000; is that correct?
A. Yes, sir.
Q. Was there any statement made at the meeting in March in your office with respect to the value of that good will of $400,000?
A. Yes; that it did not represent anything substantial. That it had been on the books ever since the incorporation of the corporation and that the patents and copyrights, whatever they were behind it, had long since ceased to have any value.

By the Referee:

Q. Well, had they expired?
A. I do not recall that the—I do not think I ever learned that there were any patents there. There were some copyrights that were no longer used. I do not think there was ever any patents.

Mr. Rosen: That is all.

By Mr. Goldstein:

Q. What you say you said about the good will was stated as your personal opinion, is that right?
A. Why, it was put something like this, as I recall it: "There is that item of good will that has been on the books [fol. 61] for a good many years. It does not represent any

real value because the trade-marks, or whatever it had, expired long ago."

Q. Did you understand that patents were carried on the books as good will?

A. I think the item is: "Good will, patents, trade marks."

Q. All together? Is that shown on that statement, Trustee's Exhibit 2?

Mr. Rosen: Yes.

Q. Let me see it, please. Did you know how much of the good will, patents and trade marks, was represented by patents?

A. You mean in 1933?

Q. How much of this $400,000?

A. In 1933?

Q. Yes.

A. Nothing. There was no value.

Q. In computing $400,000, did you know how much of it was represented by the item of patents?

A. I did not compute that figure.

Q. Then you did not know?

A. It was put on when the company was incorporated, on the first balance sheet, and had been carried at that value.

[fol. 62] In Re: J. R. Palmenberg's Son's, Inc.

Before: Hon. JOHN E. JOYCE, Referee

Adjourned Objection to Claim of Bronx Brass Foundry

New York, March 5, 1934, at 2 P. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for the Trustee, by Aaron Rosen, Esq.

Maxwell H. Goldstein, Esq., Attorney for the Claimant.

Adjourned to Thursday, March 22, 1934, at 2 P. M.

HEARING ON OBJECTIONS TO CLAIM OF THEODORE C. PALMENBERG

New York, April 10, 1934, at 2:30 P. M.

APPEARANCES:

Otterbourg, Steindler & Houston, Esqrs., Attorneys for the Trustee, Irving Trust Company by Aaron Rosen, Esq.

Samuel P. Adelman, Esq., Attorney for the Claimant.
Maxwell H. Goldstein, Esq., Attorney for Bronx Brass Foundry.
Theodore C. Palmenberg, Claimant, in person.

[fol. 63] THEODORE C. PALMENBERG, called as a witness, being first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Rosen:

Q. Mr. Palmenberg, are you an officer of the bankrupt company?
A. Yes.
Q. What office did you hold?
A. President and treasurer.
Q. You also held most of the caiptal stock of the company?
A. Yes, sir.
Q. You were in charge of the financial affairs?
A. Yes, sir.
Q. The bankrupt kept an accurate set of books?
A. Yes, sir.
Q. All entries in respect to all liabilities and credits were contained in the books?
A. Yes, sir.

Mr. Rosen: That is all.

There was a previous stipulation entered into between the Trustee and the Bronx Brass Foundry that the testimony of this claimant may be incorporated in the minutes on the hearing with respect to the claim of the Bronx Brass Foundry.

Q. Is it correct that on April 1, 1933, according to the books, the bankrupt was insolvent to the extent of $156,-254.63?
A. Yes, sir.
Q. The book assets of good will, patents and trade marks of $400,000 had no real value; is that correct?
A. It had some, but I don't know what the value was?
Q. It was very slight?
A. I considered it very much at one time.

Q. The patents and trade marks had no value at all?

A. No, sir.

[fol. 64] Q. The figure of the insolvency on April 1st of $156,254.63, according to the books, is substantially correct?

A. Yes, sir.

By Mr. Goldstein:

Q. What was the value of the name of the company at that time?

—. ——.

Q. How long had the name J. R. Palmenberg's been used by your company and predecessors in interest?

A. Eighty-one years.

Q. What is your opinion as to the value of the name of J. R. Palmenberg's in April, 1933?

A. I couldn't tell you; I couldn't answer that question.

Q. Was it worth $500 or $500,000?

Mr. Adelman: I object.

The Referee: Sustained.

Q. You mean it is so insignificant that you can't possibly guess at it?

Mr. Adelman: I object.

The Referee: Objection sustained.

Mr. Goldstein: I made a stipulation on the record here and also on the hearing of my case last Monday or Friday, in which I stated that the evidence taken here may be used at the hearing on my claim. If my cross examination is restricted, I will simply have to call Mr. Palmenberg again and go over the same subjects.

The Referee: Mr. Palmenberg says that he doesn't know and didn't know the value of the name in April, 1933. That is a definite and complete answer—he doesn't know.

Mr. Goldstein: It may be evasive.

[fol. 65] The Referee: All right. I will give you three questions to find out whether it is evasive or not.

Q. Do you consider that the name of J. R. Palmenberg's Sons or J. R. Palmenberg alone had any value at this time?

Mr. Adelman: I object.

The Referee: Objection sustained.

Mr. Goldstein: Exception.

Q. Do you know whether the name of J. R. Palmenberg's Sons or J. R. Palmenberg alone has any value in the model industry?

A. Yes, sir.

Q. Tell us what value, if any, it has.

Mr. Adelman: I object.

The Referee: Same ruling.

The Witness: I can't answer the question in dollars and cents.

Q. You mean it is so intangible that you can't possibly assess a figure?

A. Yes, sir.

Q. What, in your opinion, is the value of the name?

Mr. Adelman: I object.

The Referee: Overruled.

Mr. Adelman: Exception.

A. In dollars and cents, I can't tell you.

Q. You mean by that it is not worth anything?

Mr. Adelman: I object.

The Referee: Sustained.

Mr. Goldsteoin: Exception.

[fol. 66] Q. If you had to pay dollars and cents for it, what would your price be?

Mr. Adelman: I make the same objection.

The Referee: Same ruling.

Mr. Goldstein: Exception. I don't know of any other way to put that question.

The Referee: Proceed.

Q. During the eighty-one years that the firm was in business the name of J. R. Palmenberg was in use?

A. Yes, sir.

Q. Was that name circulated by salesmen and notes to customers in the model industry during the eighty-one years throughout the United States?

A. Yes, sir.

Q. Were the salesmen employed by J. R. Palmenberg during those eighty-one years soliciting people throughout the United States?

A. Yes, sir.

Q. Was it done on a large scale during that time?

Mr. Adelman: I object.

The Referee: He may state how large a scale it was done on.

A. By a number of men.

Q. What was the total sales a year for the ten years preceding 1933?

A. As high as $900,000, but that dropped to $300,000.

The Referee: When did it drop?

The Witness: 1929 to the end of 1932.

Q. Did the firm of J. R. Palmenberg's Sons receive orders from customers throughout the United States who were not solicited by salesmen during the ten years preceding the bankruptcy?

[fol. 67] Mr. Adelman: I object.

The Referee: Overruled.

Mr. Adelman: Exception.

A. Yes, sir.

Q. What proportion of the business done those years was done in that fashion?

A. I can't state that.

Q. Was it a fair proportion of it?

Mr. Adelman: I object to the form of the question.

The Referee: Sustained.

Q. Would you say 25 per cent of your business from customers was solicited by salesmen directly during the ten years preceding the bankruptcy?

A. I would be up against it for any figures, because it is hard to say how the orders were gotten.

Q. Did that company do an extensive advertising business in particular papers and other papers during the ten years preceding the bankruptcy?

A. Some.

Q. Some advertising?

A. Yes, sir.

Q. Once a month, or how many times a year?

A. Approximately on a monthly basis.

Q. Can you tell us in substance about how much on an average per year was spent for advertising?

A. I believe in 1929 it was about $10,000.

Q. After that how much per year was spent for advertising?

A. In the neighborhood of $5,000.

Mr. Rosen: I would like to have a concession that the liability at the time of the bankruptcy was, as per the books, $278,005.22.

The Referee: That includes the claim of $197,000?

[fol. 68] Mr. Rosen: Without interest.

Mr. Goldstein: I don't want to concede that. If any concession is made by the other side, I don't want it to appear that I joined in it.

Mr. Rosen: Will you concede that the accountant will testify to it?

The Referee: The question is whether it be conceded that the Trustee will testify that the liabilities of the corporation as shown on the books——

Mr. Rosen: $278,005.22.

The Referee: Which includes the claim of the witness in the sum of $197,916.21 plus interest, $24,517.47.

Mr. Goldstein: Without admitting the validity of the obligations as shown on the books, yes.

The Referee: All right.

Mr. Rosen: I would like a concession that they are on the books.

Mr. Goldstein: That this witness will so testify?

Mr. Rosen: Yes.

Mr. Goldstein: I will concede that, but I don't concede they were valid.

By Mr. Rosen:

Q. The liabilities appearing on the books of the bankrupt were all valid claims, as far as you know?

A. Yes, sir.

Q. All the entries contained in the books are accurate and correct?

A. With reference to the general claims?

Q. With reference to all liabilities.

[fol. 69] A. I know in my own case interest was never entered upon the books.

Q. Were any false entries made in the books at any time?

A. No, sir.

Q. Will you say that the liabilities in the books of the bankrupt at the time of the petition were $278,005.22?

A. Plus interest.

Q. Was the stock of the corporation or the bankrupt company reduced in any amount at the end of 1932?

Mr. Adelman: I object to the form of the question.

The Referee: He may ask whether there was any change in the stock structure of the corporation.

Q. Was there a meeting of the directors and stockholders at the end of 1932, at which a proposal was made for the reduction of the amount of the capital stock?

A. There was during that year, yes.

Q. Was the motion carried at the meeting?

A. I believe it was.

Q. It was?

A. Yes, sir.

Q. From what amount to what amount was the capital stock reduced?

A. Later it was to be reduced to $1 a share, common and preferred, and new stock at that time was to be issued. I don't know what the amount was, because they never carried it through.

Q. You say it was carried?

A. The suggestion was made, and the balance of the stockholders agreed to it.

Q. When you say it was not carried through, the legal [fol. 70] formality was accomplished?

A. Nothing was done at the meeting.

Q. It was voted at the meeting and nothing done?

A. Yes, sir.

Q. Was a proposal made at that time that you were to convert your loans to the corporation into shares of stock, take stock for your money?

Mr. Adelman: I object.

The Referee: Objection sustained. You may show that that was done, if that was the fact. Prove the consummation of it; omit "proposal."

Q. Was anything done about transferring stock from the corporation to you in payment of your loans?

A. No, sir.

Q. Did you agree to do so?

A. I did agree; I was willing to do that.

Q. Had you not agreed to do that with the other members of the corporation, stockholders and officers?

Mr. Adelman: I object.

The Referee: He will have to prove the transaction. That doesn't mean anything to me. Apart from the cross-examination, I don't know what he means by agreed, or whether he made a tentative arrangement.

Mr. Goldstein: I want to bring out that there was a proposal made and accepted.

Q. Was a meeting held at which such a proposal was made by you or made to you?

A. As I recall the thing, it was done at that time.

Mr. Rosen: At what time?

[fol. 71] The Witness: This meeting.

Mr. Rosen: What meeting?

The Witness: Of the stockholders, some time in 1932; if I recall, it was February or March, 1932.

The Referee: Are there minutes of that meeting in the books?

The Witness: Yes, sir.

Q. Tell us what happened at that meeting.

A. The proposal was made.

Mr. Rosen: I object, as the minutes of the meeting are the best evidence.

The Referee: Sustained.

Mr. Goldstein: Exception.

The Referee: He said there were minutes of that meeting.

Mr. Rosen: Here they are.

Mr. Goldstein: I don't understand the Trustee's position.

Mr. Rosen: You are going to knock out every objection to his claim.

Mr. Goldstein: I don't see that at all. This is a separate transaction.

Q. Maybe you can look at the minutes and show me where there is any entry of this transaction in the minutes.

Mr. Adelman: I object. There is no entry whatsoever. I object to the form of his question.

Q. Is there any meeting other than January 27, 1932, at which the proposal was made to convert into capital stock the loan made by you to the corporation?

A. There was no other meeting.

[fol. 72] Q. So that the record may be clear, I will ask you again what happened at the meeting of January 27, 1932, regarding the proposal to transfer your loans into capital stock?

Mr. Rosen: I object.

The Referee: Sustained.

Mr. Goldstein: Exception. I want to ask the witness whether these minutes are correct, and the question is directed for that purpose to the witness. It may be that all the minutes of the corporation are in the book.

Mr. Rosen: I offer these minutes in evidence.

(Received in evidence and marked Trustee's Exhibit 9, April 10, 1934.)

Q. Who kept that book, a part of which has been marked in evidence as Trustee's Exhibit 9 of this date?

A. Who had it?

Q. Who used to keep it?

A. Mr. Post.

Q. How long did he have that book prior to the bankruptcy?

A. I don't recall; probably a year.

Q. Whose duty was it to make entries in this book in the year 1932?

A. Mr. Post's.

Q. Was he present at the meeting on January 27, 1932?

A. Yes, sir.

Q. I ask you to read the minutes of the meeting of January 27, 1932, in the book marked Trustee's Exhibit 9 of this date, and tell us whether all the motions carried at that meeting are contained in this minute book?

A. As far as I can see, they are.

[fol. 73] Q. You told us just now that at that meeting a proposal had been made to you that the obligations of the corporation to you for loans made up to that time be converted into stock, and that you accepted that proposal at the meeting; is that right?

A. I accepted it?

Q. Yes.

A. No, sir.

Q. May I ask the stenographer to turn to the question and answer and read it back?

A. Maybe I misunderstood you.

Q. You want to make yourself clear now?

A. I would like to make it clear.

Q. All right; go ahead.

A. A proposal was made——

Q. By whom?

A. By me. According to my recollection, there was additional capital coming into the company from the other stockholders, and the offer was made at that time. There was no consummation of that deal. There was supposed to be a second meeting held some day in the future, when the matter was to be taken up, but nothing ever came of it.

Q. To whom had that proposition been made by you?

A. I believe it was made to Colonel Liggett, who was the spokesman for a group of stockholders, and another stockholder.

Q. At the meeting?

A. Yes, sir.

Q. Was anything done by Mr. Post or anybody else on behalf of the corporation to change the certificate of incorporation so as to provide for a different designation of the stock?

A. No, sir.

Q. The stock remained the same after January 27, 1932?

A. Yes, sir.

Q. At the time the special account of $2,500 represented by Trustee's Exhibit 3 was created, the bankrupt company [fol. 74] was buying merchandise and receiving credit from other creditors; is that right?

A. They were receiving some credit and they were paying a great deal of it.

Q. Some of the creditors who were crediting them on or about February, 1933, haven't received anything down to date.

A. Some have.

Q. Some have not.

A. Yes, sir.

Q. Some haven't received payment.

A. I don't know of any that didn't receive payment; I think the majority of them received some.

Mr. Goldstein: What percentage would you say they received?

The Referee: No, no; you will have to wait.

Q. Mr. Thursfield's company didn't receive payment on the claim?

A. I don't believe so.

Q. He sold merchandise—his company did, to Palmenberg's Sons on about February 28, 1933.

A. I think one final shipment came in.

Q. As a matter of fact, they sold merchandise to the bankrupt company after the meeting of the creditors at Mr. Post's office?

A. Yes, sir. I believe one shipment came in after that.

The Referee: We will adjourn to April 18th, at 2 P. M.

[fol. 75] Adjourned Hearing on Objection to Claim of Bronx Brass Foundry

New York, April 6th, 1934, at 10:30 A. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for Trustee, by Aaron Rosen, Esq.

Maxwell H. Goldstein, Esq., Attorney for Bronx Brass Foundry, Claimant.

(It is stipulated that this matter will be adjourned to April 18th, at 2 o'clock, at which time it will proceed. Counsel for the Claimant, Bronx Brass Foundry, stipulates that the testimony to be taken on the hearing of Objections by the Trustee to the claim of T. C. Palmenberg be made and deemed to be made a part of the record of the issues here.)

Adjourned to Wednesday, April 18th, 1934, at 2 P. M.

Adjourned Hearing on Objections to Claim of Bronx Brass Foundry

New York, April 18th, 1934, at 2 P. M.

Adjourned to Friday, April 27th, 1934, at 10:30 A. M.

[fol. 76] Adjourned Objection to Claim of Bronx Brass Foundry

New York, April 27, 1934, at 10:30 A. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for the Trustee, by Gustave I. Jahr, Esq.

Adjourned Objection to Claim of Theodore C. Palmenberg

(No appearance on behalf of Claimants)

The Referee: The objections to the claims of Theodore C. Palmenberg and the Bronx Brass Foundry are to be consolidated and will stand over until May 18, 1934, at 10:30 A. M.

ADJOURNED HEARING ON OBJECTIONS TO CLAIMS OF BRONX BRASS FOUNDRY AND THEODORE C. PALMENBERG

(Consolidated)

New York, May 18th, 1934, at 10:30 A. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for the Trustee, by Aaron Rosen, Esq.

[fol. 77] Maxwell H. Goldstein, Esq., Attorney for Bronx Brass Foundry.

Samuel P. Adelman, Esq., Attorney for T. C. Palmenberg.

Walter L. Post, Esq., Attorney for Bankrupt.

(After discussion, off the record.)

COLLOQUY

Mr. Rosen: I will call Mr. Jacobs.

Mr. Goldstein: I would like to know in what status I stand here?

Mr. Rosen: Well, Mr. Jacobs' testimony will be used both in the Palmenberg claim and in the Bronx Brass Foundry claim.

Mr. Goldstein: I don't know what my friends want to do; but if I have to proceed here today, I want to go over all these books and records for the purpose of my claim, to check on the veracity of his report.

Mr. Rosen: All right; you can go ahead and do it.

Mr. Goldstein: In the first place, I would like to know what my status is here?

(After discussion, off the record.)

The Referee: One of the factors that enters into the Trustee's motion against the claim of Bronx Brass Foundry

is the claim of T. C. Palmenberg; and in view of that, and what has been indicated to be the stipulation, I will rule now that this testimony shall apply to both the Palmenberg and Bronx Brass claims; and counsel for the Bronx Brass may cross examine any witnesses called in respect of that matter.

[fol. 78] Mr. Goldstein: Now I do not think it is quite orderly, nor is it quite fair to the Bronx Brass Foundry as a claimant here, because we are going to have two parties cross examining a witness; we are going to have testimony of a witness given with respect to dates which have nothing to do with the claim of the Bronx Brass Foundry, the condition of the business at that time; and we are going to have dates which may have something to do—that is, the testimony as to condition on dates which may have something to do with the claim of Bronx Brass Foundry.

The Referee: If the claim of Palmenberg and its existence in the amount indicated by the proof of claim filed by him, is a factor necessary to determine whether the Trustee's motion against your claim is sound, then everything that is relevant and material on the existence of Palmenberg's claim is in turn relevant and material on your claim.

Mr. Goldstein: But I am not prepared to cross examine the witness with respect to the condition that existed at the times when the payments were made to Palmenberg; and it seems to me that that is something that is material and necessary so far as——

The Referee: Payments of what, that were made to Palmenberg?

Mr. Goldstein: Withdrawals made by Palmenberg, which is the basis of the objections.

The Referee: Why, there was testimony given at the last hearing with respect of checks given to Palmenberg.

Mr. Goldstein: That is right.

The Referee: And proof attempted by him, showing that [fol. 79] the repayments to him were in payment of a special loan which he made at a time he claims the bankrupt was insolvent, and set up as a separate and distinct account between him and the bankrupt; or that such payments were exchanges for moneys he advanced to the bankrupt.

I will give you an exception.

Mr. Goldstein: Well now, if that is going to be your ruling, I prefer to withdraw the claim of the Bronx Brass Foundry and step out; and I take my exception to your ruling; and I will file a formal one, if that is the ruling.

The Referee: File a formal what?

Mr. Goldstein: A formal notice withdrawing the claim.

Mr. Rosen: I object to the withdrawing of the claim.

Mr. Goldstein: I have a perfect right to do this.

(Submitting document to the Referee.)

The Referee: You have this all prepared?

Mr. Goldstein: Yes, sir.

The Referee: I see.

Mr. Rosen: He has not got the right to withdraw this claim—I will show your Honor a decision—once we file our objections and he has submitted to the jurisdiction of the Court as to whether or not a preference has been received, the decision of this Court is an adjudication on the question of a preference.

The Referee: Well, if the objection merely goes to its claim—whether he had a claim, why I am inclined to think he can withdraw it; but if the objection goes beyond that, and may admit of a ruling which would bind the Bronx [fol. 80] Brass Company outside of its status created by filing a claim, then you may not withdraw it; the Trustee is, in effect, seeking affirmative relief against this creditor; is that right? Is that your theory?

Mr. Rosen: That is right; to expunge the claim; and under the decisions, if the Trustee is successful in expunging the claim of the Bronx Brass, unless it pays back to the estate the alleged preference, that, as an operation of law, becomes an adjudication on this question; and upon the institution of a suit for the recovery of the preference, the decision in this proceeding would be binding upon that action, and we could get a summary judgment, or a judgment on the pleadings in the Federal Court, or any other Court. Now the Courts have repeatedly held in this Circuit—in this District, that once an objection has been filed to a claim, the objecting creditor is entitled to an adjudication and that claim cannot be withdrawn.

Mr. Goldstein: I thoroughly disagree with Mr. Rosen. I consulted the authorities too before I made it; and we have had a partial hearing so far; I have taken exceptions to

rulings. Now on behalf of my client I say again, we withdraw our claim; that is all. We make no claim now in this proceeding against the J. R. Palmenberg's Sons, Inc. In other words, it is in the nature of a discontinuance.

The Referee: Well, are not you very much in the position of a plaintiff who discontinues when there is a counterclaim pending against him?

Mr. Goldstein: I beg your pardon, sir?

Mr. Rosen: Exactly.

The Referee: I say, are not you very much in the posi-
[fol. 81] tion of a plaintiff who discontinues with a counterclaim against him?

Mr. Goldstein: No——

The Referee: He can discontinue his cause of action, but he cannot discontinue the counterclaim.

Mr. Goldstein: Mr. Referee, at this stage of the proceeding there is no counterclaim against us at all.

The Referee: I do not say that there is a counterclaim. I say that there is pending an objection.

Mr. Goldstein: Now your Honor may reserve decision on that. I have taken the step of withdrawing it. If your Honor does not want to have that noted on the record that you allow the withdrawal, I will stand on my rights.

The Referee: No; I won't make any determination now, in view of the objection that has been made by the Trustee to the withdrawal, which might be deemed by you to be a complete closing of this controversy. The Trustee has pointed out that he is seeking, or it is seeking against you a determination that there was a preference and that it would be entitled, if it is right, to a recovery against you for the amount of the preference.

Mr. Goldstein: His statement is very broad—is not as broad as it seems to be on the face of it. I don't want to enter into a lengthy argument—will you have this marked, please? My formal notice withdrawing our claim?

Mr. Referee: It may be filed.

(Mr. Goldstein files notice of withdrawal of claim of Bronx Brass Foundry.)

[fol. 82] (After further discussion, off the record.)

The Referee: It may be noted that counsel for the Bronx Brass Foundry has filed a written withdrawal of its claim.

Mr. Rosen: And I duly object to the withdrawal of the claim; and your Honor will allow me an exception to any ruling which permits the withdrawal of it.

The Referee: Well, do you wish to continue the objections to the claim of the Bronx Brass Foundry?

Mr. Rosen: I will simply take Mr. Jacobs' testimony. I want a ruling on this question.

The Referee: I know; but do you want to continue the evidence in support of your objections, despite the withdrawal of this claim?

The Rosen: Yes, sir; I want to continue it. It will just be Mr. Jacobs' testimony.

Mr. Goldstein: I am going to stand on my rights. This would be in the nature of a star-chamber proceeding.

The Referee: Do you care to remain?

Mr. Goldstein: No, sir; I cannot very well remain or participate in this proceeding without waiving my rights; and so, if your Honor pleases, I shall have to withdraw. If there is any doubt about it, I shall be pleased to submit authorities. This is my claim. Even if objection is filed, it is no more than a defense to the claim. I have a right to withdraw at any stage of the proceeding.

The Referee: Well, do you wish to proceed?

Mr. Rosen: Yes.

The Referee: I will hold that the Trustee may proceed with the objections to the claim of the Bronx Brass Foundry.

[fol. 83] Mr. Goldstein: And I have an exception?

The Referee: You have an exception.

Mr. Goldstein: Will the Stenographer please note that I have withdrawn from the proceedings, and I have actually left the room.

(Mr. Goldstein thereupon left the hearing.)

Mr. Adelman: Mr. Rosen, just to clarify the proceeding. You are proceeding on the Bronx Brass Foundry claim?

Mr. Rosen: Both. I have assumed the objections that were filed by Mr. Goldstein and I am proceeding with his objections to the Palmenberg claim.

Mr. Adelman: He has withdrawn; and you are availing yourself of his objections, as an amendment to your objections, rather, and wish to make it a part of your objections?

Mr. Rosen: That is right.

MATTHEW JACOBS, called as a witness by the Trustee, being first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Rosen:

Q. Mr. Jacobs, are you a certified public accountant?
A. Yes, sir.
Q. For how many years?
A. Oh, about fifteen years.
Q. You have examined the books of the bankrupt?
A. Yes.
Q. Now on April 1st, 1933, did the bankrupt have any cash in the bank?
A. No, sir.
[fol. 84] Q. Well, what was the condition of the bankrupt's bank account at that time?
A. It had an overdraft, so far as the books showed, an overdraft of $4,219.52.
Q. And on April 1st, 1933, what did the books indicate as to matured obligations for merchandise and money loaned?
A. Well, the books, accounts payable, of $43,223.67.
Q. And what portion of that was past due?
A. Oh, I should say about 90 per cent.
Q. And that is indicated from the books of the bankrupt?
A. Yes, sir.

Mr. Rosen: That is all.

By the Referee:

Q. That was on May 1st?
A. There were some more liabilities.
Q. (Question repeated.)
A. April 1st; that is as of April 1, 1933.

The Referee: Is that all?

By Mr. Rosen:

Q. Mr. Jacobs, what did the books indicate in respect to the assets?
A. There was petty cash as of that date of $69.46. Notes receivable $10,049.35; accounts receivable $10,361.75; inventory $33,726.91; equipment and fixtures, net after reserve

for depreciation $70,140.04; advances to salesmen $5,417.22; deferred charges (which was insurance) $1,852.54; good-will, patents, trade-marks, $400,000. Total assets, $527,-398.12.

Q. And what did the books indicate as to the liabilities on April 1, 1933?

[fol. 85] A. In addition to the—well, starting off again with accounts payable of $43,223.67; in addition to that there were notes payable of $22,134.29; notes payable to T. C. Palmenberg, $216,828.40; accrued dividends $1,467.39. Total liabilities of $283,652.75.

Q. It had a book net worth of how much?

A. As of that date?

Q. Yes.

A. Book value of—well, their capital was $243,745.37.

Q. Now you know that Mr. Palmenberg testified that the good-will, patents and trade-marks had no value at all?

A. Yes; I heard that——

Mr. Adelman: (Interposing) I object to that. That is not his testimony. He said he did not know.

The Witness: He said he did not know of any value.

Q. Well, you heard Mr. Post, an officer of the bankrupt, testify that they had no value?

A. I recall some testimony——

Mr. Post: (Interposing) No; I think I testified the same way.

By the Referee:

Q. Did the books show any valuation of those items?

A. No, sir; they were on since—as far as I could see, from the very inception of the business; that is, the corporation.

By Mr. Rosen:

Q. If you deduct the value of the good-will, patents and trade-marks as appearing upon the books, Mr. Jacobs, what [fol. 86] was the condition of the business?

A. Well, if you do that, the corporation would be insolvent to the extent of $156,254.63.

By the Referee:

Q. That is on April 1st, 1933?

A. April 1st, 1933.

Q. Did you make an audit as of any previous date?

A. As of the date of the bankruptcy, July 18th.

Q. Well, I mean, as of any date previous to April 1, 1933?

A. Oh, no; I did not make any audit. I just took these figures from the books and records.

Q. Did you make any examination of the figures as of any date previous to April 1, 1933?

A. No, sir. May I add that I have taken figures from the books previous to this date for the purpose of giving creditors full information as to the trend of the business. I took off a balance sheet for previous years and P & L figures.

By Mr. Rosen:

Q. What did the balance sheet of the previous date show, and what was the date?

A. Well, I have just got pencil figures here, which I showed the figures.

(After discussion, off the record.)

Q. Mr. Jacobs, the figures that you have testified to are contained on this sheet of paper? (Indicating.)

A. Yes, sir; that is a copy.

Mr. Rosen: I offer it in evidence.

[fol. 87] (Marked "Trustee's Exhibit 4".)

(After discussion, off the record.)

Q. Were there any shipments made in that period, Mr. Jacobs?

A. From the American Brass? Yes.

By Mr. Rosen:

Q. After February 28th, 1933?

A. Yes; quite a few.

Q. About how much?

A. Oh, about $1,300.

Q. And the American Brass have not received any payments on their account?

A. No, sir.

Q. Are there any other items of a similar nature?
A. Any other accounts?
Q. Yes?
A. Well, I will have to go through this whole book. (After examining book) There are some—quite a few of them—that is, you mean received no money at all?
Q. I mean, bills that were created after February 28th, 1933, when the special loan account was created, and upon which no payments were made at all?
(Witness continues examination of book.)

By Mr. Adelman:

Q. Did the American Brass ship you anything between March 18th and July 15th?
A. Yes; they shipped plenty.

By the Referee:

Q. How much did they ship?
A. Around $1,300 worth.
[fol. 88] Q. After February 28th, 1933?
A. Yes.
Q. Were they on a monthly basis?
A. I don't know. I would have to go to the purchase book and get the bills and everything else.
Q. Were there shipments in April by the American Brass?
A. Yes.
Q. How much did they amount to?
A. $418.
Q. And May?
A. May amounted to $149.
Q. And June?
A. None in June or July.

By Mr. Adelman:

Q. During those two months that you testified shipments were made, in April and May, were any payments made to the American Brass?
A. No; none whatsoever.

By Mr. Rosen:

Q. You say there are some other similar accounts?
A. Yes; a few of them.
Mr. Rosen: That is all.

[fol. 89] ADJOURNED HEARING ON OBJECTION TO CLAIM OF BRONX BRASS FOUNDRY

New York, June 21, 1934, at 2 P. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for the Trustee, by Aaron Rosen, Esq.

(No appearance on behalf of Claimant.)

RULING ON MOTION TO EXPUNGE CLAIM

Mr. Rosen: At this time I would like to take up the question of the claim of the Bronx Brass Foundry. I think we filed a memorandum in opposition to the withdrawal of their claim. They were notified of this hearing today.

The Referee: The Trustee moves to expunge the claim of Bronx Brass Foundry, Inc., upon the ground that within four months preceding the filing of the petition on July 18, 1933, it received voidable preferences.

In March, 1933 the claimant and the American Brass Company were the largest merchandise creditors. The bankrupt called a meeting, which was attended by representatives of each of them. The representatives of the American Brass Company testified that he stated at the meeting in the presence of the claimant's attorney, who is an accountant, and two of its representatives, that the debtor was bankrupt. The bankrupt's attorney, who was present, testified that the condition of the company, in- [fol. 90] cluding a very substantial indebtedness to its president, T. C. Palmenberg, was discussed and that he informed those present that the company was unable to carry on unless the creditors granted an extension of time, and added, that if Palmenberg pressed his claim, the company could not pull out of its difficulties. It was indicated at the meeting that he might be willing to subordinate his claim if the other creditors agreed to the extension proposed. The evidence sufficiently proves that the company was then insolvent to a very marked extent.

Within a few days the claimant instituted suit and shortly thereafter moved for summary judgment. To prevent judgment the bankrupt, after April 15th, gave and the claimant accepted six checks aggregating $1,000. Some of the checks were post dated. Two of them bore the endorsements of an officer, which the claimant required. The

American Brass Company was a creditor in a larger amount and sold and delivered merchandise to the bankrupt after the March meeting, but no payments were made to it.

Upon the proof adduced by the Trustee, it is plain that the claimant had reasonable cause to believe that the payments made to it effected preferences in its favor. After several hearings and the taking of testimony of some eighty pages, the claimant presented a written withdrawal of its claim. The Trustee refused to acquiesce in the withdrawal, and was permitted to proceed with its proof, whereupon counsel for the claimant withdrew.

The question presented is whether or not the claimant was entitled, on its own motion, to withdraw its claim and [fol. 91] thereby avoid a finding of preference which would be res adjudicata in a plenary suit to recover a preferential payment. When a creditor files a claim against the bankrupt estate he elects a forum which may hear and determine whether a preference to him was made. Although judgment of recovery may not be granted, the finding thereon, subject to review, is conclusive as between the parties. It is not intended that a party shall have two trials of the same issue or be permitted to present the same issue to different tribunals for determination. When issue is joined upon the question whether a voidable preference has been received, the creditor may not withdraw of his own motion and thereby avoid such determination as the proof warrants. In re Helfand Shoe Co. Inc., 22 A. B. R. (N. S.) 487.

The claim will be expunged unless within twenty days after entry of an order herein the claimant pays to the Trustee the sum of $1,000 with interest from the date of the service of the motion to expunge.

Closed.

[fol. 92] TRUSTEE'S EXHIBIT 1

No. 2789
May 26, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Atty.—$100.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

Samuel Shapiro
Maxwell H. Goldstein, Atty.
Maxwell H. Goldstein, Special

No. 2288
May 1, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Attorney for Bronx Brass Foundry—$250.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

T. C. Palmenberg
Maxwell H. Goldstein, Attorney for Bronx Brass Foundry. Special.

[fol. 93]

No. 2287
Apr. 24, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Attorney for Bronx Brass Foundry—$250.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

T. C. Palmenberg
Maxwell H. Goldstein, Atty., Special.

No. 2788
May 19, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Atty.—$100.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

Samuel Shapiro
Maxwell H. Goldstein, Atty.

[fol. 94]

No. 2791
June 9, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Atty.—$100.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

Maxwell H. Goldstein, Atty., Special.

No. 2792
June 16, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Atty.—$100.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

Maxwell H. Goldstein, Atty.

[fol. 95] TRUSTEE'S EXHIBIT 2

Copy of report submitted by Isaac Schmelkin, Accountant & Auditor, 2932 Cruger Ave., New York.

Schedule "H"

J. R. Palmenberg's Sons, Inc. Page Seven

Balance Sheet—January 2, 1933

Assets:

Fixed Assets—Present Market Value:

Furniture & Fixtures	12,906.61	
Less Reserve for Deprec.	29.02	12,877.59
Tools and Auto—		
Active	8,913.90	
Less Reserve for Deprec.	322.24	8,591.66
Machinery	40,408.87	
Less Reserve for Deprec.	643.01	39,765.86
Patterns & Moulds—		
Active		6,510.00
Improvement Cost of Show-room		356.23
Total Fixed Assets		68,101.34
Good-will, Patents, & Trademarks		400,000.00

[fol. 96] Current Assets:

Petty Cash Fund—		
Third Street	90.37	
39th Street	10.00	
Boston	50.00	
Cash Irving Trust Co.	781.16	
Notes Due from Trade	52.50	
Accounts Receivable 22,914.79		
Less Res. for Bad debts 5,777.72	17,137.07	
Inventory—Market Value	33,726.91	
Total Current Assets		51,848.01
Advances to Salesmen		16,154.25
Deferred Charges:		4,431.68
Total assets		540,535.28

Copy of report submitted by Isaac Schmelkin, Accountant & Auditor, 2932 Cruger Ave., New York.

[fol. 97] Schedule "H"

J. R. Palmenberg's Sons, Inc. Page Eight

Balance Sheet—January 2, 1933

Current Liabilities:

Notes Payable		11,551.03
Accounts Payable		16,997.61
Loans Payable		10,046.25
Taxes Payable—New York State		1,467.39
Water & Real Estate Tax Reserve		358.20
Payroll & Salaries Payable		4,261.37
T. C. Palmenberg		217,991.67
F. Ordemann		7,800.00
D. Palmenberg		2,063.33
Total Current Liabilities		272,536.85
Salesmen Reserve for Commissions:		1,320.09
Reserve for Legal Fees		500.00
Contingent Liabilities:		
4th & Market, Adjustment Pending		1,625.00
Total Liabilities		275,981.94
Capital Stock:		
Capital Stock Common		400,000.00
Capital Stock Preferred	400,000.00	
Less Treasury Stock	34,500.00	365,600.00
Deficit Account		500,946.66
Total Liabilities, Capital & Surplus		540,535.28

[fol. 98] TRUSTEE'S EXHIBIT 3

J. R. Palmenberg's Son, Inc.

89 West Third Street, New York

Balance Sheet

March 1, 1933

Assets:

Fixed Assets—		
Furniture and Fixtures	12,906.61	
Less Reserve for Deprec.	29.02	12,877.59
Tools and Auto—Active	8,936.70	
Less Reserve for Deprec.	322.24	8,614.46
Machinery	40,577.22	
Less Reserve for Deprec.	643.01	39,934.21
Patterns and Moulds—Active		6,510.00
Improvement cost of show-room		2,196.08
Total Current Assets		70,132.34
Good-will, Patents, and Trade-marks		400,000.00
Current Assets—		
Petty Cash: Third Street	34.68	
Seventh Ave.	10.00	
Boston	50.00	
Notes Due from Trade	52.50	

[fol. 99] J. R. Palmenberg's Son, Inc.

89 West Third Street, New York

Accounts Receivable	22,474.26	
Less Reserve for Bad Debts	5,758.67	16,715.59
Inventory, Market Value, Jan. 1, 1933		33,726.91
Total Current Assets		50,589.68
Advances to Salesmen		16,296.74
Deferred Charges		2,715.98
Total Assets		539,734.74

J. R. Palmenberg's Son, Inc.

89 West Third Street, New York

Current Liabilities:

Notes Payable		10,240.39
Accounts Payable		19,956.12
Cash Overdrawn		760.11
Madison Industrial Corp.		7,218.19
Taxes Payable—New York State		1,467.39
Water and Real Estate Tax Reserve		608.20
Payroll and Salaries Due		7,553.69
T. C. Palmenberg and (Mary) differ		224,590.53
F. Ordemann		7,875.00
D. Palmenberg		2,083.33
Reserve for Sales Advertising		24.50
Total Current Liabilities		282,377.45
[fol. 100] Salesmen Reserve for Commissions		855.43
Reserve for Legal Fees		500.00
Contingent Liabilities—		
4th and Market Street—Adjust, Pending		1,625.00
Total Liabilities		285,357.88
Capital Stock—		
Capital Stock—Common		400,000.00
Capital Stock—Preferred	400,000.00	
Less Treasury Stock	34,500.00	365,500.00
		1,050,857.88
Deficit Account		511,123.14
		539,734.74

TRUSTEE'S EXHIBIT 4

J. R. Palmenberg Sons Inc.

Balance Sheet

April 1, 1933

Assets:

Cash in Bank Overdraft	$4,219.52	
Petty Cash	69.46	
Notes Receivable	10,049.35	
Accounts Receivable	10,361.75	
Inventory	33,726.91	
Equipment and Fixtures	70,140.41	
[fol. 101]. Advances to Salesmen	5,417.22	
Deferred Charges	1,852.54	
**Good Will, Patents & Trademarks	400,000.00	
Total Assets		$527,398.12

Liabilities and Capital:

Accounts Payable	$43,222.67	
Notes Payable	22,134.29	
Notes Payable—T. C. Palmenberg	216,828.40	
Accrued Taxes	1,467.39	
Total Liabilities		$283,652.75
Capital Stock Issued	$765,500.00	
Deficit	521,754.63	
Book Value of Capital		243,745.37
Total Liabilities and Capital		$527,398.12

**If you deduct the Good Will from the book value of the capital, you will find the corporation is insolvent to the extent of $156,254.63, even after allowing full value for all assets.

[fol. 102] CLAIMANT'S EXHIBIT B

Walter L. Post, Counsellor at Law, 84 William Street, New York

May 19, 1933.

Maxwell H. Goldstein, Esq.,
1440 Broadway, New York.

DEAR MR. GOLDSTEIN:

Re: Bronx Brass Foundry vs. J. R. Palmenberg's Sons Inc.

I confirm our conversation yesterday to the effect that no judgments have been entered against J. R. Palmenberg's Sons, Inc. I am having a search made to see if I can find any which may have been entered without my knowledge, but I doubt very much if any exists.

Very truly yours, Walter L. Post.

WLP:W

[fol. 103] CLAIMANT'S EXHIBIT C

Walter L. Post, Counsellor at Law,
84 William Street, New York.

January 15, 1934.

Otterbourg, Steindler & Houston, Esqs.,
200 Fifth Avenue, New York.

Attention of Mr. Rosen:

GENTLEMEN:

I have your letter with reference to the Bronx Brass Foundry, Inc.

The Bronx Brass Foundry was one of the first creditors of J. R. Palmenberg's Sons, Inc., who were called into conference after it was found that the company needed help. A meeting was held at my office, which was attended by Mr. Thursfield, representative of the American Brass Company, and representatives of the Bronx Brass Foundry with their attorney, Maxwell H. Goldstein. The financial condition of Palmenberg was explained to them and the figures on the latest balance sheet were shown them. These

showed that the company was insolvent. They were told, however, that if the creditors would work along with Mr. Palmenberg, he would be glad to enter into a satisfactory arrangement for the subordination of the debt to him. It is not my recollection that the formal agreement was presented at that meeting but the main terms thereof, that all merchandise obligations be extended for one year, [fol. 104] were explained to them. This meeting was sometime the latter part of February.

On March 15th a summons and complaint was served upon J. R. Palmenberg's Sons, Inc. I had several talks after that with Mr. Goldstein and whenever I talked with him I emphasized that the company was insolvent and if the creditors would not assist and grant extensions, the company would wind up in bankruptcy. Mr. Goldstein's attitude all through was that he was going to do all he could to get payment for his client, and it was the usual attitude assumed in these cases that the other creditors will see that the dissenter gets preference, rather than to have the entire settlement fail.

On April 15th a motion was made for summary judgment and one of the reasons for granting the motion was the allegation that creditors, including the Bronx Brass, had been asked for a long extension of time to pay. This motion was adjourned from time to time pending some payments which were made, and finally on May 19th the motion was withdrawn under an agreement that $500.00 would be paid at the rate of $100.00 a week. Mr. Goldstein insisted that these checks be endorsed by Mr. Shapiro, Vice-President of the Palmenberg Company, and I am not sure whether this was done. The stipulation provided, however, that judgment might be entered in the action should any judgment be entered against Palmenberg Company, a default be made in any of the payments, or a notice of bulk sale issued. All together there was paid, according to my recollection, $1,000.00 to the Bronx Brass, and I doubt if anyone of the checks went through the first time. I know that some of them were returned by the bank three or four times before being paid.

[fol. 105] The checks are in the possession of the Trustee and they probably will show what happened to them.

Yours very truly, Walter L. Post.

WLP:W

CLAIMANT'S EXHIBIT D

Law Offices of

Otterbourg, Steindler & Houston

200 Fifth Avenue, New York

December 28th, 1933.

DEAR SIRS:

Re—J. R. Palmenberg Sons, Inc.

In connection with the above entitled matter, I would greatly appreciate your forwarding me all of the details and data regarding the preference paid to the Bronx Brass Foundries, Inc. I contemplate instituting proceedings immediately.

Very truly yours, Otterbourg, Steindler & Houston,
by Aaron Rosen.

AR.JW
mb
to—Samuel P. Adelman, Esq.,
500—5th Avenue, N. Y. C., Walter L. Post, Esq.,
84 Williams Street, N. Y. C.

[fol. 106] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXPUNGING CLAIM

Upon the proof of claim filed herein by Bronx Brass Foundries, Inc., in the sum of $2,101.10, upon the petition of the Trustee to expunge the said claim dated January 5th, 1934, upon the notice of hearing dated January 18th, 1934, upon the answer of the said claimant to the proceedings filed February 2, 1934, and after hearing the testimony of the witnesses produced by the Trustee in support of its motion to expunge the claim of Bronx Brass Foundries, Inc., and it appearing to my satisfaction after hearing all of the testimony and after examination of all of the ex-

hibits submitted herein, that the bankrupt was insolvent at the time of the payment of $1,000 as more specifically referred to in the opinion of the Referee herein, and that the said claimant, Bronx Brass Foundries, Inc., had reasonable cause to believe that it was obtaining a preference, and it being my opinion that the payment of the said $1,000 to said Bronx Brass Foundries, Inc., was a preference in violation of the Bankruptcy Act, it is on motion of Otterbourg, Steindler & Houston, attorneys for the Trustee

[fol. 107] Ordered that the claim of Bronx Brass Foundries, Inc., filed herein in the sum of $2,101.10, be expunged, unless within twenty days from the date hereof, there be paid to the Trustee the sum of $1,000 together with interest from January 29th, 1934, and it is further

Ordered that the application of Bronx Brass Foundries, Inc., to withdraw its claim be and the same is hereby denied.

Dated, June 29, 1934.

John E. Joyce, Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR REVIEW OF REFEREE'S ORDER

To the Hon. John E. Joyce, Referee in Bankruptcy:

The petition of Bronx Brass Foundry, Inc., respectfully shows:

1. That petitioner was a creditor in the above named proceeding, and, as such, was a party to the following pro-
[fol. 108] ceeding in said bankruptcy pending before Hon. John E. Joyce, as Referee in charge thereof, to wit:

Objection was made to the claim of the petitioner by the Trustee in Bankruptcy upon the ground that the petitioner had received a preference. In the said proceeding and prior to the time the Trustee had made out a prima facie case, the petitioner withdrew its proof of claim in this proceeding. It served upon the Referee in Bankruptcy a written notice withdrawing the proof of claim. Said notice

of withdrawal of the claim was accepted by the Hon. John E. Joyce, the Referee. That thereafter, and after the withdrawal, and acceptance of the withdrawal of the proof of claim, and on or about the 29th day of June, 1934 a final order was made by said Referee expunging the claim filed by the petitioner herein unless within twenty days from the date of said order there be paid to the Trustee the sum of $1,000.00, together with interest from January 29, 1934; and it was further ordered that the application of the Bronx Brass Foundry, Inc., to withdraw its claim be denied.

2. That the said order was and is erroneous in this:

(a) That the Referee had accepted the notice withdrawing the proof of claim from the petitioner herein and had no right thereafter to make an order expunging the said claim on the condition that the sum of $1,000.00 be paid as aforesaid.

(b) It was not proven that petitioner received any preference.

[fol. 109] (c) That the petitioner had the right to withdraw its proof of claim at any time before the hearings upon the objections were completed and a decision made.

(d) The denial of the application to withdraw the proof of claim was erroneous and contrary to law.

(e) The order denying the application to withdraw was entered without notice to the petitioner that hearings would be continued and conducted upon the said matter after the service of the notice of withdrawal of the claim had been accepted by the Referee. The order was violative of the rights of the petitioner and contrary to the constitutional provisions applicable thereto.

(f) It was not shown that there would be any prejudice to the Trustee in Bankruptcy by the withdrawal of the claim. There was an abuse of discretion, if any existed, on the part of the Referee in making the order complained of.

Wherefore petitioner prays that the said order be reviewed and that it be reversed, and that it be ordered that the petitioner had properly withdrawn its claim, and that

petitioner be restored to all things it has lost by reason of said errors.

Dated, New York, July 11, 1934.

Bronx Brass Foundry, Inc. by Morris Friedman, Secretary. Petitioner.

[fol. 110] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Bankruptcy—No. 57815

REFEREE'S CERTIFICATE

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

Pursuant to General Order XXVII, I, John E. Joyce, the referee in charge of the above matter, do hereby certify the following:

6. Objections of Bronx Brass Foundry, Inc., a creditor, to the claim of Theodore C. Palmenberg;

7. Petition of Bronx Brass Foundry, Inc., to review order expunging its claim unless it pay to the trustee the sum of $1,000 received as preferential payments, and denying its right to withdraw its claim during the hearing on the objections thereto;

8. Order dated June 29, 1934 to be reviewed;

9. Proof of debt of Bronx Brass Foundry, Inc., for $2,101.10;

10. Petition of the trustee to expunge that claim and notice of hearing thereon;

[fol. 111] 11. Answer to Bronx Brass Foundry, Inc.;

12. Notice of withdrawal by that creditor of its claim and proof of debt;

Attached are (a) minutes of hearing on the claim of Bronx Brass Foundry, Inc., containing at pp. 103-106, an opinion, and (b) minutes of hearing on the Palmenberg claim which contain at pp. 52-55 an opinion.

The petitions to review the two orders are included in one certificate because of the stipulation (Bronx Brass Foundry, Inc., Record, p. 77) that the testimony upon the Palmenberg claim be made and deemed part of the record on the other.

The facts and the question presented are stated in the respective opinions.

July 20, 1934.

Respectfully submitted, John E. Joyce, Referee.

To be placed on the Bankruptcy Motion Calendar of the United States District Court, July 25, 1934, and notice thereof given by mail to:

Otterbourg, Steindler & Houston, Attorneys for Trustee, 200 Fifth Avenue, New York, N. Y.

Samuel P. Adelman, Attorney for Theodore C. Palmenberg, 500 Fifth Avenue, New York, N. Y.

Maxwell H. Goldstein, Attorney for Bronx Brass Foundry, Inc., 1440 Broadway, New York, N. Y.

[fol. 112] IN UNITED STATES DISTRICT COURT

In the Matter of J. R. Palmenberg's Sons, Inc., Bankrupt

Bankruptcy No. 57815

ORDER APPROVING ORDER OF REFEREE—Sept. 11, 1934

The Bronx Brass Foundry Inc., the claimant herein, having filed its petition to review a certain order made and entered on the 29th day of June, 1934 by the Honorable John E. Joyce, Referee, which order expunged the claim of the Bronx Brass Foundry Inc. unless the said claimant paid the sum of $1,000, together with interest, within twenty days thereof, and the hearing on said petition to review having duly come on before this Court on the 5th day of September, 1934,

Now, on reading and filing the petition to review of the [fol. 113] Bronx Brass Foundry Inc., verified the 11th day of July, 1934, and upon reading and filing the Referee's certificate of review on said petition, and after hearing Max-

well Goldstein, Esq., attorney for Bronx Brass Foundry Inc. in support of said petition to review, and Aaron Rosen, Esq., of counsel for Otterbourg, Steindler & Houston, attorneys for the Irving Trust Company, Trustee in bankruptcy herein, in opposition to said petition to review, and due deliberation having been had herein, and upon filing the decision of this Court, it is, on motion of Otterbourg, Steindler & Houston, attorneys for the Trustee in bankruptcy herein,

Ordered that the petition to review of the claimant, Bronx Brass Foundry Inc. be and the same is hereby dismissed, and that the action and order of the Referee in respect thereto be and the same hereby is approved.

Alfred C. Coxe, U. S. D. J.

[fol. 114] In United States District Court

Petition for Appeal

To the Honorable Judges of the United States District Court for the Southern District of New York:

The claimant, Bronx Brass Foundry, Inc. in the above entitled cause, conceiving itself aggrieved by the order, decree and judgment of the United States District Court for the Southern District of New York, made and entered herein on the 12th day of September, 1934, do hereby appeal from the said order, judgment and decree, and from every part thereof, to the Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith and pray that the said appeal may be allowed, that a transcript of the record and of the proceedings upon which said order, judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, September 20th, 1934.

Yours, etc., Maxwell H. Goldstein, Attorney for Claimant, Bronx Brass Foundry, Inc., 1440 Broadway, Borough of Manhattan, City of New York.

[fol. 115] To: Charles Weiser, Esq., Clerk of the above-named Court. Otterbourg, Steindler & Houston, Esqs., Attorneys for Trustee, 200 Fifth Avenue, New York City.

The foregoing appeal is hereby allowed.
Dated: October 5, 1934.

Alfred C. Coxe, U. S. D. J.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Now comes the claimant, Bronx Brass Foundry, Inc., and files the following assignment of errors upon which said claimant will rely upon the prosecution of the appeal in the above entitled cause from the order and decree and judg-
[fol. 116] ment made and entered in this Court on or about the 12th day of September, 1934:

1. That the Court erred in holding that the claimant, Bronx Brass Foundry, Inc. did not have the right to withdraw its proof of claim.

2. The Court erred in holding that the claim of Bronx Brass Foundry, Inc. be expunged unless it pay to the Trustee the sum of $1,000.00.

3. The Court erred in holding that claimant, Bronx Brass Foundry, Inc., received a preference.

4. The Court erred in holding that the Referee could proceed to take further evidence from the Trustee after the service of the notice of the withdrawal of the claim and the acceptance thereof by the Referee.

5. The Court erred in holding that the Referee could continue the hearing in the absence of claimant and its counsel on the objections to the claim of Bronx Brass Foundry, Inc. after filing of the notice withdrawing the claim, and without notice or warning to the claimant or its attorney that evidence would be taken against it and without giving the claimant due hearing and preserve its constitutional rights.

6. The Court erred in holding that the Referee could deny the application of the claimant to withdraw its claim; and that there was not an abuse of discretion on the part of the Referee therein.

[fol. 117] 7. The Court erred in approving the order of the Referee denying the application of the Bronx Brass Foundry, Inc. to withdraw its claim and expunging its

claim unless within 20 days the claimant pay to the Trustee $1,000.00. The Court erred in dismissing the petition for review filed by the claimant, Bronx Brass Foundry, Inc., to review the said order of said Referee.

Dated: New York, Oct. 4th, 1934.

Yours, etc., Maxwell H. Goldstein, Attorney for Claimant, Bronx Brass Foundry, Inc., 1440 Broadway, Borough of Manhattan, City of New York.

To: Charles Weiser, Esq., Clerk of the above Court.
Otterbourg, Steindler & Houston, Esqs., Attorneys for Trustee, 200 Fifth Avenue, New York City.

[fol. 118] Citation in usual form omitted in printing.

[fol. 119] In United States District Court

[Title omitted]

Petition for Appeal

To the Honorable Judges of the District Court for the Southern District of New York:

The claimant, Bronx Brass Foundry, Inc., in the above entitled cause, conceiving itself aggrieved by the order, decree and judgment of the United States District Court for the Southern District of New York, made and entered herein on the 12th day of September, 1934, do hereby appeal from the said order, judgment and decree, and from every part thereof, to the Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith and pray that the said appeal may be allowed, that a transcript of the record and of the proceedings upon which said order, judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, September 20th, 1934.

Yours, etc., Maxwell H. Goldstein, Attorney for claimant, Bronx Brass Foundry, Inc., 1440 Broadway, Borough of Manhattan, City of New York.

[fol. 120] To the Clerk of the above named Court.
Otterbourg, Steindler & Houston, Esqs., Attorneys for Trustee, 200 Fifth Avenue, New York City.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Now comes the claimant, Bronx Brass Foundry, Inc., and files the following assignment of errors upon which said claimant will rely upon the prosecution of the appeal in the above entitled cause from the decree and order made and entered in this Court on or about the 12th day of September, 1934:

1. That the Court erred in holding that the claimant, Bronx Brass Foundry, Inc. did not have the right to withdraw its proof of claim.

2. The Court erred in holding that the Referee could proceed to take further evidence from the Trustee after the service of the notice of the withdrawal of the claim and the acceptance thereof by the Referee.

[fol. 121] 3. The Court erred in holding that the Referee could continue the hearing in the absence of claimant and its counsel on the objections to the claim of Bronx Brass Foundry, Inc. after filing of the notice withdrawing the claim, and without notice or warning to the claimant or its attorney that evidence would be taken against it and without giving the claimant due hearing and preserve its constitutional rights.

4. The Court erred in holding that the Referee could deny the application of the claimant to withdraw its claim; and that there was not an abuse of discretion on the part of the Referee therein.

5. The Court erred in approving the order of the Referee denying the application of the Bronx Brass Foundry, Inc. to withdraw its claim. The Court erred in dismissing the petition for review filed by the claimant, Bronx Brass Foundry, Inc. to review the said order of said Referee.

Dated, New York, October 4, 1934.

Yours, etc., Maxwell H. Goldstein, Attorney for claimant, Bronx Brass Foundry, Inc., 1440 Broadway, Borough of Manhattan, City of New York.

[fol. 122] To the clerk of the above Court.

Otterbourg, Steindler & Houston, Esqs., Attorneys for Trustee, 200 Fifth Avenue, New York City.

[fol. 123] In United States Circuit Court of Appeals, Second Circuit

In the Matter of J. R. Palmenberg's Sons, Inc., Bankrupt.
Bronx Brass Foundry, Inc., Appellant

Order Granting Leave to Appeal—Oct. 15, 1934

A motion having been made herein for the appellant for leave to appeal from a certain order of the District Court, dated September 12, 1934.

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 124] In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, January 10, 1935.

Otterbourg, Steindler & Houston, Attorneys for Trustee. Maxwell H. Goldstein, Attorney for Bronx Brass Foundry, Inc.

[fol. 125] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 126] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of

J. R. PALMENBERG SONS, INC., Bankrupt

BRONX BRASS FOUNDRY, INC., Claimant-Appellant,

against

IRVING TRUST COMPANY, as Trustee, Appellee

Before: L. Hand, Swan and Augustus N. Hand, Circuit Judges

Appeal from United States District Judge for the Southern District of New York

From an order of the District Court affirming a decision of the referee in bankruptcy which denied the application of the Bronx Brass Foundry, Inc., for leave to withdraw its claim against the bankrupt estate, and expunged the claim unless, within twenty days, there should be paid to the trustee the sum of $1,000 and interest, Bronx Brass Foundry, Inc. appeals. Affirmed.

Maxwell H. Goldstein, Attorney for Bronx Brass Foundry, Inc., Claimant-Appellant; Milton C. Jacobs, Counsel.
[fol. 127] Otterbourg, Steindler & Houston, Attorneys for Irving Trust Company as Trustee, Appellee; Aaron Rosen and Arnold A. Jaffee, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

Bronx Brass Foundry, Inc., a creditor of the bankrupt, filed its proof of claim for $2,101.10 and Irving Trust Company, the trustee, filed a petition to expunge the claim on the ground that the creditor, within four months prior to the date of filing the petition in bankruptcy, had received an unlawful preference of $1,000 knowing that the bankrupt was insolvent. The referee ordered the claim expunged unless the preferential payments should be restored to the trustee in bankruptcy within twenty days, and also denied an application by the creditor to withdraw its claim. That

order was affirmed by the District Court and the present appeal is taken from the order of affirmance.

When the motion to expunge the claim of the creditor was heard by the referee, the evidence clearly indicated that the creditor was paid $1,000 on account of its claim within four months of the date of the filing of the petition in bankruptcy and at a time when the latter knew that J. R. Palmenberg Sons, Inc., was insolvent, though it is not altogether certain that, if the assets existing at the time of such payment had been applied to the payment of all the creditors, the Bronx Brass Foundry, Inc., would have received more than its pro rata share. Before the hearing was closed, the creditor moved to withdraw the claim so as to avoid a decision by the referee that an unlawful preference had been received. The referee, John E. Joyce, Esq., in denying the motion to withdraw the claim rendered the following decision:

[fol. 128] "When a creditor files a claim against the bankrupt estate he elects a forum which may hear and determine whether a preference to him was made. Although judgment of recovery may not be granted, the finding thereon, subject to review, is conclusive as between the parties. It is not intended that a party shall have two trials of the same issue or be permitted to present the same issue to different tribunals for determination. When issue is joined upon the question whether a voidable preference has been received, the creditor may not withdraw of his own motion and thereby avoid such determination as the proof warrants. In re Helfand Shoe Co., Inc., 22 A. B. R. (N. S.) 487.

"The claim will be expunged unless within twenty days after entry of an order herein the claimant pays to the Trustee the sum of $1,000 with interest from the date of the service of the motion to expunge."

We are satisfied that the decision as well as the reasoning of the referee were entirely correct.

The questions raised by this appeal are: (1) whether the creditor had an absolute right to withdraw its claim, and (2) whether, if it had not, and the referee properly exercised his discretion in denying the application, the creditor received a voidable preference, though the proof did not show that when it was paid the $1,000 or ⅓d the amount then due it, the assets were insufficient to pay the other creditors ⅓d of the amount of their claims.

In support of the absolute right to withdraw the claim the decisions in Ex parte Skinner & Eddy Corp., 265 U. S. 86, 93; Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 146; Scholl Mfg. Co. v. Rodgers, 51 Fed. [fol. 129] (2d) 971, (C. C. A. 8); Deeley v. Cincinnati, 23 Fed. (2d) 920, (C. C. A. 6), and Lawrence Ward's Island Realty Co. v. United States, 209 Fed. 201, 203, (C. C. A. 2) may be cited in support of the creditor's position. But the decisions of the Supreme Court go no farther than to say that a complainant may discontinue his suit unless its dismissal "would prejudice the defendant in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind." Ex parte Skinner & Eddy Corp. (at p. 93). Thus, if a defendant has interposed a counterclaim, the complainant has no absolute right to discontinue his suit. In Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 146, the court used general language and said: "If the defendants have acquired some rights which might be lost or rendered less efficient by the discontinuance, then the court, in the exercise of a sound discretion may deny the application." If leave to withdraw the claim had been granted, the trustee would have lost the right to litigate, in connection with its motion to expunge, the question whether the creditor had acquired a preference. Though the denial of leave did not entitle the trustee to a recovery, it did establish the fact of a preference; and left nothing for subsequent litigation except the amount of the claim. Everything else is res judicata. To have deprived the trustee of the right to establish in the summary proceeding the fact of a preference would have been to take away a substantial right.

In Scholl Mfg. Co. v. Rodgers, 51 Fed. (2d) 97, (C. C. A. 8), and in Deeley v. Cincinnati, 23 Fed. (2d) 920, (C. C. A. 6), it was said that such prejudice as we have mentioned was insufficient to bar the right of a creditor to withdraw his claim, but, with all respect, we do not think it necessary or desirable to allow the process of the court to [fol. 130] be trifled with by creditors whose rights have to be disposed of, if there is to be convenient and speedy administration of the estates of bankrupts.

Several District Courts of the Second Circuit have adopted local rules making the dismissal of suits in equity discretionary and we have approved such local rules. The

present rule of the Southern District of New York reads as follows:

"2. Voluntary Discontinuances. If justice require, the Court, after issue joined, may refuse to permit the plaintiff to discontinue even though the defendant cannot have affirmative relief under the pleadings and though his only prejudice be the vexation and expense of a possible second suit upon the same cause of action."

We think the foregoing rule valid and regard the right to discontinue as procedural rather than substantive and within the power of judicial regulation. While these rules do not in terms apply to bankruptcy courts, proceedings in those courts are in the nature of proceedings in equity, Bardes v. Hawarden Bank, 178 U. S. 524, 535, and the local rules we have mentioned indicate that the present judicial attitude toward the right to discontinue a suit or proceeding is more liberal than formerly.

It would have been particularly unreasonable to allow the creditor in the present proceeding to withdraw its claim. At the time when the application for leave to withdraw was made, the question whether the bankrupt was insolvent and whether the creditor had reasonable cause to believe that a preference would be effected by the payment, had already [fol. 131] been litigated before the referee at several hearings and the evidence was almost closed. It is impossible to discover any merit in the creditor's application and the granting of it would have involved at least some prejudice to the estate. In such circumstances denial was entirely justified. Smith v. Carlisle, 228 Fed. 666.

The claim that the payment of $1,000 within the four months period was not a voidable preference, unless it represented a larger percentage than the other creditors would have received, had the assets of the bankrupt been liquidated and distributed at the time when the payment was made, is thought to be substantiated by decisions of the Court of Appeals of the Eighth Circuit in Haas v. Sachs, 68 Fed. (2d) 623; Mansfield Lumber Co. v. Sternberg, 38 Fed. (2d) 614, 617, and W. S. Peck & Co. v. Whitmer, 231 Fed. 893, 897. But we do not agree with the interpretation of Section 60 of the Bankruptcy Act on which those decisions were based. The retention by Bronx Brass Foundry Inc. of the $1,000 received from the insolvent would result

in giving it an advantage over the other creditors. The claim, before that payment was made, amounted to $3,000. If another creditor had a claim of $3,000 and the estate paid a dividend of 50%, Bronx Brass Foundry, Inc., would receive $2,000 in all, while the other creditor, though having a claim in the same amount, would receive but $1,500. The fallacy of the contention on the part of Bronx Brass Foundry, Inc. was pointed out by Judge Knappen in Commerce Guardian Trust & Savings Bank v. Devlin, 6 Fed. (2d) 518, 519, (C. C. A. 6).

Whether a creditor of an insolvent has received an unlawful preference is not to be determined by what the [fol. 132] situation would have been if the estate had been completely liquidated and distributed among all the creditors at the time when the alleged preferential payment was made, but upon whether the ultimate result of a payment by a known insolvent "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Bankruptcy Act § 60 (a).

Inasmuch as the retention by the creditor of $1,000 would work a preference in the present case, the referee properly required the return of that sum to the trustee as a condition of the allowance of the claim. Bankruptcy Act. § 57 (g).

Order affirmed.

[fol. 132½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of J. R. Palmenberg Sons, Inc., Bankrupt. Ex parte Bronx Brass Foundry Inc. Opinion. Augustus N. Hand, C. J.

[fol. 133] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 22nd day of April, one thousand nine hundred and thirty-five.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of

J. R. PALMENBERG SONS, INC., Bankrupt,

BRONX BRASS FOUNDRY, INC., Appellant

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re J. R. Palmenberg, Inc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 22, 1935. William Parkin, Clerk.

[fol. 135] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 134, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of J. R. Palmenberg, Inc., Bankrupt, Bronx Brass Foundry, Inc., Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of April, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

Endorsed on cover: File No. 39,786. U. S. Circuit Court of Appeals, Second Circuit. Term No. 232. Bronx Brass Foundry, Inc., Petitioner, vs. Irving Trust Company, as Trustee in Bankruptcy of J. R. Palmenberg's Sons, Inc. Petition for a writ of certiorari and exhibit thereto. Filed July 9, 1935. Term No. 232 O. T. 1935.

(7061-C)

FILE COPY

No. 232

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

BRONX BRASS FOUNDRY, INC.,

Petitioner,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. PALMENBERG'S SONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MAXWELL H. GOLDSTEIN,
Counsel for Petitioner.

Crosby Press, Inc., 56-60 Gold Street, N. Y. City. Beekman 3-3178

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Supreme Court of the United States

OCTOBER TERM, 1935

BRONX BRASS FOUNDRY, INC.,

Petitioner,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. PALMENBERG'S SONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully submits its petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above case.

Summary Statement of the Matter Involved

On the 18th day of July, 1933, a petition in bankruptcy was filed in the United States District Court for the Southern District of New York against J. R. Palmenberg's Sons, Inc. (R. P. 6, fol. 17). It was thereafter adjudicated bankrupt. On the 25th day of September, 1933, your petitioner filed its proof of debt as a creditor of the bankrupt. The proof of debt was for $2,100.00 (R. P. 2), representing the balance due on an indebtedness of $3,100.00. The $1,000.00 paid on account was received by your petitioner in several payments within the proscribed four months' period (R. P. 12, fol. 36).

The trustee in bankruptcy objected to the allowance of your petitioner's claim, charging that an unlawful preference had been effected (R. P. 6). Hearings upon the issue of unlawful preference were held before a referee in bankruptcy. During the hearing, and prior to the time that the trustee completed the presentation of its evidence, your petitioner elected to withdraw its proof of debt (R. P. 79). The referee, when the application was made, gave no positive ruling (R. P. 81, fol. 242). Your petitioner refrained from further participation in the proceeding (R. P. 81, fol. 242). The referee, after concluding the hearing in the absence of your petitioner, denied the application to withdraw and held that there had been an unlawful preference. He ordered the claim expunged (R. P. 89-90).

The ruling of the referee was affirmed by the District Court (R. P. 112) without opinion and in turn the orders of the District Court and the referee were affirmed by the United States Circuit Court of Appeals for the Second Circuit.

The only evidence introduced by the trustee of the condition of the bankrupt within the four months period (March 18 to July 18, 1933) was its financial condition on April 1st, 1933 (Trustee's Ex. 4, R. P. 100). The proof consisted of an extract from the books of the bankrupt which showed assets of $127,398.12 (omitting good will), and liabilities of $283,652.75. This showed that at the time the payments were made to petitioner the debtor's (bankrupt) estate was sufficient to pay all creditors at least 45% of their claims; and if the book value of its good will were to be accepted, it was fully solvent. It thus affirmatively appeared that petitioner received less than one-third of its claim at a time when all other creditors could have been paid at least 45% of their claims. The Circuit Court of Appeals in its opinion recognized that this was so (76 Fed. [2nd] 935, at page 937).

There is no evidence in the record to show that in the bankruptcy proceedings the general creditors will receive less than one-third of their claims.

The Circuit Court of Appeals held, upon the question of the right to withdraw the proof of debt, that if leave to withdraw the claim had been granted, the trustee would have lost the right to litigate, in connection with the motion to expunge, the issue of preference, and that this right was a substantial one of which the trustee could not be deprived (Page 936). The Court also relied upon a local district rule making the dismissal of suits in equity discretionary (Page 936), and considered the proceeding in bankruptcy an equity proceeding and therefore within the operation of the rule.

In interpreting Section 60 of the Bankruptcy Act (11 U. S. C., Sec. 96), the Court below held that although the part payment was not preferential at the time it was made, nevertheless it became preferential because your petitioner might receive a dividend in the bankruptcy proceeding (Page 937).

The Questions Presented

A. Upon the matter of withdrawing the proof of debt in a bankruptcy proceeding:

1. Has a creditor an absolute right to withdraw his proof of debt, at any stage of the proceedings before decision, unless other creditors will thereby suffer legal prejudice?

2. Does the vexation of future litigation upon the same matter constitute legal prejudice?

3. Is the withdrawal of a proof of debt a matter resting within the discretion of the referee or District Court?

4. May a local District Court make a rule limiting the right to withdraw a proof of debt?

B. Upon the question of an unlawful preference where a creditor receives a partial payment:

1. Is a *part* payment of a debt made while the debtor is a going concern, preferential, if, at the time of payment, the assets of the debtor are sufficient to pay all other creditors of the same class an equal or greater percentage of their debt?

Jurisdiction

The order of the Circuit Court of Appeals for the Second Circuit, sought to be reviewed, was entered on the 22nd day of April, 1935.

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347a).

Statute Involved

Section 60 of the Bankruptcy Act (11 U. S. C. A., §96) reads as follows:

> "(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition * * * made a transfer of any of his property, and the effect of * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class * * *.
>
> "(b) If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of transfer * * * and being within four months before the filing of the petition in bankruptcy * * * the

bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby * * * shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Opinions Below

The referee and the District Court rendered no opinions. The opinion of the Circuit Court of Appeals is reported at 76 Fed. (2nd) 935.

Reasons Relied on for Allowance of Writ

A.—The decision of the Court below is in conflict with the decisions of the Sixth and Eighth Circuit Courts of Appeals upon both main questions.

The Court below in its opinion, at page 936, expressly acknowledges this fact, citing the cases of *Scholl Mfg. Co.* v. *Rodgers,* 51 Fed. Rep. (2d) 971 (C. C. A. 8) and *Deeley* v. *Cincinnati,* 23 Fed. Rep. (2d) 920 (C. C. A. 6) holding to the contrary on the question of the right to withdraw a proof of claim; and, at page 937, the cases of *Haas* v. *Sachs,* 68 Fed. Rep. (2d) 623 (C. C. A. 8) and *Peck* v. *Whitmer,* 231 Fed. Rep. 893 (C. C. A. 8) holding to the contrary on the question of what constitutes an unlawful preference.

(1) Upon the question of withdrawing the proof of debt, the decision is in conflict with the case of *Scholl Mfg. Co. Inc.* v. *Rodgers,* 51 Fed. Rep. (2d) 971 (C. C. A. 8), wherein the identical situation was presented. In that case, at pages 973, 974, the rule on the subject of withdrawing a proof of debt in bankruptcy is stated as follows:

"That a claim filed in a bankruptcy proceeding may be withdrawn is the general rule * * *. The

exception to the general rule as to the right of a dismissal is where such dismissal or withdrawal will result in legal prejudice to the other party, which would be the situation if there were a counterclaim at issue or affirmative action sought by defendant * * *. It is to be noted in the case at bar that no affirmative relief was asked by the trustee. There was no counterclaim. The claim of appellant was objected to because goods had been returned which the trustee claimed amounted to a preference and such preference was urged as a *defense* to appellant's claim. The trial court was of the opinion that the right to have an adjudication of preference made by the referee was an affirmative right and was in the nature of affirmative relief against the claim filed.

"We are unable to agree with this theory. What the trustee loses by a withdrawal of the claim is the opportunity to have determined a question that might be of benefit to him in a suit brought to recover the alleged preference. Is this sufficient to bring this case within the exception to the general rule as to the right to dismiss? * * * A plenary suit in equity by the trustee would be necessary to recover the preference, and the referee would have no jurisdiction over such suit. * * * The referee could have decided there was a preference and hence that the claim could not be allowed, and that holding affirmed by the District Court would of course be of value as *res adjudicata* in an action to recover the preference. However, granting that such adjudication is of some value, the fact remains that the trustee was asking for no affirmative relief, and was in no position to demand such relief under the objection filed to proof of claim. The relief asked is merely the establishment of the preference as a defense to the

claim, and *we are satisfied that the mere depriving the trustee of the opportunity to have the question of preference passed on in this hearing is not the destruction of any substantial right, or sufficient to constitute legal prejudice and warrant the overruling of the petition of appellant to withdraw its claim.*" (Italics ours.)

(2) Upon the question of unlawful preference, it is in conflict with decisions of the Circuit Court of Appeals for the Eighth Circuit. That Court in the case of *Haas* v. *Sachs*, 68 Fed. Rep. (2d) 623 (C. C. A. 8), reviewed its previous decisions and stated the settled rule of that Circuit as follows, at pages 625, 626:

> "If enough assets remain after a transfer to one creditor to give other creditors in the same class as great or greater percentage of their claims, then no voidable preference results. W. S. Peck & Co. v. Whitmer (C. C. A. 8), 231 F. 893, 897; Mansfield Lumber Co. v. Sternberg (C. C. A. 8), 38 F. (2d) 614, 617.
>
> "This Court has held that whether the effect of the transfer will be to enable the creditor receiving it to obtain a greater percentage of his claim than other creditors of the same class, is to be determined as of the date of the actual transfer, and not as of some future date when later events have altered the assets or liabilities, or when court liquidation may have caused shrinkage of values and other losses * * *. It conclusively appears that, at the time appellant received the $2,000.00 payment, the bankrupt still had sufficient assets to pay to other creditors in the same class a *greater* percentage of their debts * * *. There was therefore no voidable preference, and the order appealed from is reversed * * *." (Italics ours.)

It conflicts also with the decision of Circuit Court of Appeals for the Seventh Circuit. The case of *Butler Paper Co.* v. *Goembel*, 143 Fed. Rep. 295 (C. C. A. 7) at page 297, states:

> "The valuation for the test of solvency or insolvency under the issue must relate to the conditions, as a going concern, when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy intervened • • •."

Upon both questions, therefore, the decision which is here sought to be reviewed is in conflict with other Circuits.

B.—The decision of the Court below is contrary to the decisions of this Court and of a well settled common law rule governing the right of a litigant to discontinue. The general rule on this subject is stated in *Ex Parte Skinner & Eddy Corp.*, 265 U. S. 86, and in *Pullman Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138. The opinion of the Court below attempts (at page 936) to distinguish these two cases, but it is nevertheless plain from the opinion that it failed to distinguish these cases from the case at bar and that it clearly conflicts with the decisions of this Honorable Court. The statement to be found in the opinion is that if leave to withdraw the claim had been granted, the trustee would have lost the right to litigate, in connection with the motion to expunge, the question whether the creditor has acquired a preference (Page 936). Thus, the opinion is opposed to the general rule, as stated in the *Ex Parte Skinner & Eddy Corp.* case that the necessity for future litigation of the same kind is not *"legal"* prejudice which would render the allowance of discontinuance a matter of discretion rather than absolute right. We quote from *Ex Parte Skinner & Eddy*, 265 U. S. 86, at pages 92 and 93:

> "At common law a plaintiff has an absolute right to discontinue or dismiss his suit *at any stage of the*

proceedings prior to verdict or judgment, and this right has been declared to be substantial • • •. It is ordinarily the undisputed right of a plaintiff to dismiss a bill in equity before final hearing • • •. In Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 146, this statement of the rule in City of Detroit v. Detroit City Ry. Co., 55 Fed. 569, was approved:

> 'It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases (Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702). The exception was where a dismissal of the bill would prejudice the defendants *in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind.*'

"• • • The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons or may not have given the real one cannot affect his right." (Italics ours.)

C.—The Court below has decided an important question of general law in a manner which is untenable and in conflict with the weight of authority. The conditions under which a litigant may discontinue his action, or in this case, his proof of debt, are well settled, and the authorities, to which the decision of the Court below is opposed, are referred to in its opinion (Page 936) and have been already sufficiently pointed out in this petition.

D.—The decision of the lower Court gives sanction to a rule of the District Court, upon the subject of discontinu-

ances, which is beyond the rule-making powers of the District Court, and is contrary to the law as laid down by this Honorable Court. In the case of *Ex Parte Skinner & Eddy Corp.*, 265 U. S. 86, the right to discontinue a suit is declared to be a substantial right. The opinion of the lower Court considers the matter a procedural one, and thus within the province of a District Court to regulate by rules. The effect of the lower Court's decision is, therefore, to render ineffectual the decision of this Honorable Court.

E.—The construction of Section 60 of the Bankruptcy Law, an important Federal statute, is involved in this case. The problem of determining preferences as defined by that statute is an ever-recurring one.

This Honorable Court has never construed that statute.

We have shown that there is disagreement among the Circuits as to the construction thereof. The interpretation by the Court below is strained and violative of its plain language. The Court below holds that though a part payment when made is not *then* preferential in fact, it nevertheless becomes preferential if the creditor may receive a dividend in a possible future bankruptcy proceeding. This obviously disregards the language of subdivision (b) of Section 60, which, in defining a voidable preference makes the test of preference, not what might happen in the future and as a result of uncertain events which may never occur, but the effect at the time of the transfer and the knowledge of the creditor of such effect at such time. This statute contains the phrases "*then* operate as a preference" and "*then* have reasonable cause to believe" (Section 60b). The opinion of the Court below holds in effect that if a creditor who at the time of transfer has received only his proportionate share of the assets does *not* file a proof of debt in the event of future bankruptcy, he has not received a preference; but if he does file his proof of debt and may receive a dividend therein which will give him more than

his proportionate share (although this fact may be unknown until the very time that the dividend is ready for payment) he has received a preference; and, even if he files a proof of debt but there be no assets in the estate he has not received a preference.

Thus, under this interpretation, the expenses of administration may be the controlling factor in the determination of the question as to whether an unlawful preference had been effected in a transaction taking place months prior to bankruptcy, because, in many cases, the expenses of administration leaves nothing for distribution to creditors.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify to and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 330, In the Matter of Bronx Brass Foundry, Inc., Appellant, against Irving Trust Co., Appellee, and that the said order of the said Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

BRONX BRASS FOUNDRY, INC.,
Petitioner,

By MAXWELL H. GOLDSTEIN,
Counsel for Petitioner.

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CHARLES ELMORE CROPL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 232.

BRONX BRASS FOUNDRY, INC.,
Appellant.

—vs.—

IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. Palmenberg's Sons, Inc.,
Respondent.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

APPELLANT'S BRIEF

MAXWELL H. GOLDSTEIN,
Counsel for Appellant,
Bronx Brass Foundry, Inc.

The Alpert Press, 138 Livingston Street, Brooklyn, N. Y. Tel. TRiangle 5—1058-1059

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 232.

BRONX BRASS FOUNDRY, INC.,
Appellant,

—vs.—

IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. Palmenberg's Sons, Inc.,
Respondent.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

APPELLANT'S BRIEF.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 76 Fed. (2nd) 935.

Jurisdiction.

This Court granted a writ of certiorari to Appellant on October 14, 1935. Jurisdiction is invoked under Section 240 (A) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 347a).

Concise Statement of the Case.

This is an appeal by a creditor in a bankruptcy proceeding from an order of the Circuit Court of Appeals for the Second Circuit which affirmed an order of the District Court, which in turn affirmed an order of the Referee in Bankruptcy. The order of the Referee in Bankruptcy denied the application of the Appellant (creditor) to withdraw its claim against the bankrupt estate, and expunged the claim upon the ground that Appellant received a preference.

On July 18, 1933, an involuntary petition in bankruptcy was filed against J. R. Palmenberg's Sons, Inc.; and on August 10th, 1933, it was adjudicated a bankrupt in the United States District Court for the Southern District of New York (R., pp. 4, 6, fol. 6). One of its creditors was the Bronx Brass Foundry, Inc., the appellant here. It filed a proof of claim for the sum of $2,101.10, representing the balance due on a debt of $3,101.10 (R., p. 2). Payments totalling $1,000. had been paid to it by the debtor, within the proscribed four months period prior to bankruptcy, as follows:

Date	*Amount*
April 24, 1933	$250.00
May 1, 1933	250.00
May 19, 1933	100.00
May 26, 1933	100.00
June 9, 1933	100.00
June 16, 1933	100.00

(Trustee's Exhibit I, R., p. 68). (Another payment of $100.00 was made during the period.) (R., p. 7, fol. 12.)

Objections were filed by the Trustee to the allowance of the claim upon the ground that a preference had been obtained by the claimant as a result of said payments (R., p. 4).

Hearings upon the question whether there had been a preference were held before Referee John E. Joyce. At the third session or hearing on the objections, the Referee ruled, over the objection of the Appellant, that the objection to the

claim of Theodore Palmenberg, another creditor, be consolidated and heard together with the objection to this claim. Before the Trustee had rested its case, and promptly after this ruling, appellant withdrew its proof of claim (R., p. 59). The Referee permitted the notice withdrawing the claim to be filed (R., p. 60). He was then pressed by both sides to announce whether he would permit the withdrawal. He failed to decide the question at that time and asked the attorney for the creditor whether he wished to remain. On receiving a negative response, he said he would hear the evidence from the Trustee (R., pp. 60, 61, fols. 81, 82).

The only evidence adduced by the Trustee as to the value of the business of the bankrupt at the time of the alleged preference (Payments were made between April 24 and June 16th, 1933) related to April 1st, 1933. That evidence consisted of an extract from the books of the bankrupt made by the Trustee's accountant showing the condition of the business as of April 1st, 1933 (Tr. Ex. 4, R., p. 74). This statement showed that the corporation was solvent if the stated book value of the good will were included in the assets; and if the same were excluded, that creditors could be paid more than one-third (45%) of their claims.

Assignment of Errors.

The following is a specification of the errors upon which Appellant will rely upon this appeal:

1. The Court below erred in holding that the creditor, Bronx Brass Foundry, Inc., did not have the right to withdraw its proof of debt.

2. The Court below erred in holding that the Trustee in Bankruptcy would suffer legal prejudice from the allowance of the withdrawal of the proof of debt.

3. The Court below erred in holding valid the rule of the District Court for the Southern District of New York, which makes discontinuances on the part

of plaintiffs discretionary with the Court even though no legal prejudice may be suffered by the defendant; and in applying that rule to bankruptcy proceedings.

4. The Court below erred in holding that the receipt by the Appellant (creditor) of the sum of $1,000.00 representing less than ⅓ of appellant's claim constituted a voidable preference even though the debtor's (bankrupt) estate had, at the time of such payment, or transfer, sufficient assets to have paid all other creditors of the same class an equal or greater percentage of their debts.

5. The Court below erred in holding that the claim of Bronx Brass Foundry, Inc. be expunged unless it pay to the Trustee the sum of $1,000.00.

Summary of Argument.

A. Appellant contends that under the decision of this Court in the case of *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, a creditor in a bankruptcy proceeding has an absolute right to withdraw his proof of debt at any time prior to judgment thereon. Appellant contends also that the loss of the right on the part of the Trustee of the possibility of obtaining an adjudication of the issue of preference on such hearing is not legal prejudice and constitutes nothing more than the vexation of another law suit on the same issue as defined by this Honorable Court in that case. Consequently, we argue that the Court below erred in denying the application of the creditor, Appellant, to withdraw its proof of debt, which was made during the course of the hearing on the objection to its claim and before the Trustee had rested its case.

B. Appellant contends that a part payment to a creditor within the proscribed four months period, which does not represent a greater proportion of the creditor's claim than other creditors of the same class could receive at the time of payment, does not constitute a voidable preference.

ARGUMENT.

A.

THE DENIAL OF THE APPLICATION TO WITHDRAW THE PROOF OF CLAIM WAS ERROR, SINCE NO LEGAL PREJUDICE WOULD RESULT THEREFROM.

The creditor (Appellant) withdrew its proof of claim immediately upon the decision of the Referee, over the objection of Appellant, consolidating the hearings of the objections to the claim of this creditor and the objections to the claim of Theodore C. Palmenberg (R., p. 59, fol. 79). Whether this ruling over the objection of Appellant furnished reason sufficient to justify discontinuance or withdrawal of the claim, this Honorable Court has held to be immaterial in the case of *Ex parte Skinner & Eddy*, 265 U. S. 86.

The Referee permitted the notice withdrawing the claim to be filed, inquired of Appellant whether it cared to remain, and then ruled that the Trustee could proceed with his evidence (R., p. 61, fol. 82). We contend that the Referee's actions in this regard, were equivocal as well as erroneous.

The Circuit Court of Appeals held that Appellant had no right to withdraw its proof of claim since, if

> "leave to withdraw the claim had been granted, the trustee would have lost the right to litigate, in connection with its motion to expunge, the question whether the creditor had acquired a preference. Though the denial of leave did not entitle the trustee to a recovery, it did establish the fact of preference, and left nothing for subsequent litigation except the amount of the claim. Everything else is *res judicata*. To have deprived the trustee of the right to establish in the summary proceeding the fact of a preference would have been to take away a substantial right" (R., p. 89, fol. 129).

Appellant respectfully maintains that the Circuit Court, in thus stating the rule, has deviated from the well settled

law on the subject and is in error. It is an established principle that a plaintiff in an action at law or in a suit in equity may discontinue at any stage of the proceedings before verdict or judgment, upon payment of costs, as a matter of right, unless legal prejudice will result to the other party. Unless a counterclaim or cross bill is interposed and the defendant is entitled to some affirmative relief, or the other party could be deprived of some substantial right which has accrued to him since the suit was commenced, the plaintiff has an absolute right to discontinue, and his reasons therefor are immaterial. The mere prospect of being harassed and vexed by future litigation of the same kind does not operate to alter the rule. The annoyance to the other party of a second litigation is not ground for refusing to dismiss a bill.

In this case all we have is a proof of claim filed by a creditor. In questioning the claim upon the ground that a preference has been received by the creditor, the Trustee simply interposes what amounts to an objection or defense to the claim. The Trustee is not entitled to any affirmative relief. While the pressing of the issue to judgment might give to the Trustee an adjudication available to it in any action it might bring to recover the alleged preference, the same holds true in every case. But that is no valid reason for denying to a litigant the right to withdraw his claim. Were the Circuit Court correct in its statement of the law, then there could, under no circumstances, be a discontinuance of an action or withdrawal of a bill or proof of claim, for, in every case an adjudication is prevented or delayed. And in every case, a defendant may say that the discontinuance by plaintiff prevents an adjudication of the issue.

This Court, in the case of *Ex parte Skinner & Eddy*, 265 U. S. 86, at pages 92 and 93 states the rule on the subject as follows:

> "At common law a plaintiff has an absolute right to discontinue or dismiss his suit *at any stage of the*

proceedings prior to verdict or judgment, and this right has been declared to be substantial * * *

It is ordinarily the undisputed right of a plaintiff to dismiss a bill in equity before final hearing * * *

'It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases * * * The exception was where a dismissal of the bill would prejudice the defendants *in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind.*' * * *

The right to dismiss if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons or may not have given the real one cannot affect his right." (Italics ours.)

One of the leading cases on the subject, which was cited with approval by the Supreme Court in the latter case, is *Pennsylvania* v. *Globe*, 121 Fed. 1015. The defendant in that case contended that the plaintiff could not discontinue after the hearing had started. The Court overruled this contention, and at page 1016, said:

"The general rule that a complainant has the right to dismiss his bill at any time before hearing is too firmly established to require any citation of authority. It is equally well settled that the annoyance to the defendant of a second litigation is not ground for refusing to dismiss the bill. The only question which can arise in any given case is whether the complainant comes within the exceptions to the rule. These exceptions may be briefly stated: First, where the dismissal would deprive the defendant of some substantial right which has accrued to him since the suit was commenced; second, where the defendant prays for, or is entitled to, some affirmative relief, as, for example, where there is a cross bill * * *

"So far as appears, the defendant is in no way prejudiced by the dismissal of this suit further than his liability to a second suit for the same cause of action.

> "The contention of the defendant is that the general rule giving the right to complainant to dismiss his bill at any time before hearing means 'at any time before setting down for hearing.' Whatever may have been the practice in England, this interpretation of the rule has not been adopted by the federal courts."

This doctrine has been accepted and applied to claims in bankruptcy.

> *In re Stewart* (D. C. N. Y.), 178 Fed. 463;
> *In re Strickland,* 167 Fed. 867;
> *Scholl* v. *Rodgers* (C. C. A. 8 Cir.), 51 Fed. (2d) 971;
> *Deeley* v. *Cincinnati* (C. C. A. 6 Cir.), 23 Fed. (2d) 920.

In the case of *In re Stewart,* 178 Fed. 463, the Court at page 468 says:

> "I do not think it within the power of the court, or referee, to prevent such withdrawal or abandonment of the claim presented. The withdrawal is a matter of right in the creditor, and not a matter of discretion with the referee or judge."

The Circuit Court of Appeals for the Eighth Circuit passed upon a case which is on all fours with the case at bar. *Scholl* v. *Rodgers,* 51 Fed. (2d) 971. In that case a claimant in a bankruptcy proceeding sought to withdraw its claim after objections thereto were filed by the trustee upon the ground of preference. The objection of the trustee was the same as in the case at bar, that the withdrawal would deprive him of the right to a summary adjudication of the issue of preference, which adjudication would be of value, as *res adjudicata* in a suit to recover the preference. The Court held that the creditor's right to withdraw the claim was absolute; *and that deprivation of the opportunity to have a summary disposition of the issue of preference was not legal prejudice.* The Court

reviewed the authorities on the subject and at pages 971, 973, 974, say:

"This is an appeal * * * from an order of the District Court affirming the decision of the referee in bankruptcy refusing the petition of appellant to withdraw its claim filed in the bankruptcy proceeding * * *

"We pass to the other question as to whether appellant had the right as a matter of law to withdraw its proof of claim * * * That a claim filed in a bankruptcy proceeding may be withdrawn is the general rule * * *

"The exception to the general rule as to the right of dismissal is where such dismissal or withdrawal will result in legal prejudice to the other party, which would be the situation if there were a counterclaim at issue or affirmative action sought by defendant * * *

"It is to be noted in the case at bar that no affirmative relief was asked by the trustee. There was no counterclaim. The claim of appellant was objected to because goods had been returned which the trustee claimed amounted to a preference and such preference was urged as a *defense* to appellant's claim. The trial court was of the opinion that the right to have an adjudication of preference made by the referee was an affirmative right and was in the nature of affirmative relief against the claim filed.

"We are unable to agree with this theory. What the trustee loses by a withdrawal of the claim is the opportunity to have determined a question that might be of benefit to him in a suit brought to recover the alleged preference. Is this sufficient to bring this case within the exception to the general rule as to the right to dismiss? * * *

"A plenary suit in equity by the trustee would be necessary to recover the preference, and the referee would have no jurisdiction over such suit * * * The referee could have decided there was a preference and hence that the claim could not be allowed, and that holding affirmed by the district court would of course be of value as *res adjudicata* in an action to recover the preference. However, granting that such adjudication is of some value, the fact remains that the trustee was asking for no affirmative relief, and was in

> no position to demand such relief under the objection filed to proof of claim. The relief asked is merely the establishment of the preference as a defense to the claim, and *we are satisfied that the mere depriving the trustee of the opportunity to have the question of preference passed on in this hearing is not the destruction of any substantial right, or sufficient to constitute legal prejudice and warrant the overruling of the petition of appellant to withdraw its claim.* The trustee would have to go to the home state of appellant (Illinois) to recover this alleged preference *if appellant had never filed its proof of claim,* or if, being filed the referee and the trial court had held there was a preference." (Italics ours.)

The leading authors on the subject are in accord with this view. Remington, in his work on Bankruptcy (3rd ed.) at sec. 754 says:

> "The right of withdrawal is an absolute right of the claimant and is not subject to the discretion of the court."

The objections interposed to a claim upon the ground of preference are designed to prevent a creditor who has been preferred from sharing in the assets of the bankrupt's estate. That purpose is achieved by the creditor voluntarily withdrawing his claim. (*Scholl* v. *Rodgers, supra.*)

Upon the creditor taking such action and withdrawing from the bankruptcy proceeding, the trustee may at once institute suit in the proper tribunal for the recovery of any alleged preference. He would be obliged to bring such a suit whether a claim were filed or not. Therefore, other creditors are in no way prejudiced by the withdrawal, and the administration of the bankrupt estate is not retarded.

The Circuit Court points to a rule of the district court governing voluntary withdrawals, and holds that the rule controls, with the assertion that the matter is procedural rather than substantive. The holding in effect nullifies the decision of this Honorable Court on the subject, and, there-

fore, cannot be sustained. If the right to withdraw is procedural, subject to exclusive control by the court where the action is pending, then, whether such control be expressed in the form of a rule promulgated or in a decision of the particular court, there would be no basis for an appeal to or consideration by an appellate court of the question of withdrawal. The very fact that appellate courts, including this Honorable Court, have rendered judgments upon the question is proof sufficient that no mere matter of procedure is involved. In the case of *Ex Parte Skinner* v. *Eddy,* 265 U. S. 86, 92, this Court said (we repeat):

> "At common law a plaintiff has an absolute right to discontinue or dismiss his suit at any stage of the proceedings prior to verdict or judgment, and this right has been declared to be *substantial* * * *." (Italics ours.)

Appellant respectfully contends, therefore, that the Court below committed error in affirming the order of the Referee and District Court refusing to allow the creditor to withdraw its claim or proof of debt.

B.

A CREDITOR WHO RECEIVES A PART PAYMENT OF HIS CLAIM DOES NOT RECEIVE A PREFERENCE IF AT THE TIME OF PAYMENT THE DEBTOR'S ESTATE, VALUED AS A GOING CONCERN, WOULD BE SUFFICIENT IF DISTRIBUTED, TO PAY ALL OTHER CREDITORS OF THE SAME CLASS AN EQUAL PROPORTION OF THEIR CLAIMS.

The problem presented on this appeal concerns the application of Section 60 of the Bankruptcy Act to a part payment of a debt within the proscribed four months' period.

Where a creditor receives full payment of his claim during that period there can be no question that he has received

a preference that may be voidable if he knew or had reasonable cause to believe that the debtor was then insolvent, because insolvency means that the debtor can not pay all his creditors in full.

In this case the Appellant had a claim in the sum of $3,101.10 against the bankrupt. It filed its claim for the balance of $2,101.10 (R., p. 2). Within the four-month period it received payments on account as follows:

Dates	*Amounts*
April 24, 1933	250.00
May 1, 1933	250.00
May 19, 1933	100.
May 26, 1933	100.
June 9, 1933	100.
June 16, 1933	100.

(Trustee's Ex. 1, R., p. 68). Another payment of $100 was made during that period (R., p. 7). These payments aggregated less than ⅓ of its claim.

We do not raise any issue as to knowledge of insolvency on this appeal. We contend that the evidence shows that there was no preference in fact effected by any single payment on account nor by the total payments on account because the evidence adduced by the Trustee, viewed most favorably to the Trustee, showed that at the time these payments were made the debtor could have paid all creditors at least 45% of their claims, if the assets of the debtor were then distributed among the creditors.

We contend that since there was no preference in fact there can be no voidable preference. In other words, mere knowldge of insolvency does not convert into a voidable preference a part payment, which does not represent a greater proportion of the debtor's assets than other creditors could then receive. The Bankruptcy Act requires proof of two important elements to make out a voidable preference. The first is, that the transfer should *at the time of transfer* oper-

ate to give to the creditor a greater percentage of the debtor's assets than other creditors of the same class could then receive. Second, that the creditor *then* knew or had reasonable cause to believe that the debtor was insolvent and that such transfer would then effect a preference. We contend in this case that both elements are completely lacking.

The only evidence adduced by the Trustee as to the financial condition of the debtor at the time of transfer was purely of documentary character, consisting of a transcript of the books of the debtor, showing its financial condition as of April 1st, 1933 (Trustee's Ex. 4, R., p. 74). If we eliminate the item of good will this exhibit shows that the assets amounted to $127,398.12 and the liabilities to $283,652.75. The percentage of assets to liabilities was more than 45%. Appellant received less than 33% of its claim. Consequently, it did not *then* receive a greater proportion of its debt than other creditors of the same class could then have received if the debtor's estate were distributed at the time these payments were made to Appellant.

Appellant here is viewing this exhibit most favorably to the Trustee by eliminating the item of good will. The evidence showed that the debtor continued in business down to the time of bankruptcy which was July 18th, 1933; that the bankrupt had been in business for 81 years (R., p. 49, fol. 66); that during that time it had advertised on a rather large scale (R., pp. 50, 51, fol. 67). There is no competent evidence in the record that the good will was worthless. There was substantial evidence which we have already referred to indicating that the good will was a substantial asset of the bankrupt. If the good will was worth $400,000, the figure at which it was carried on the bankrupt's books, or even half that amount, the debtor was fully solvent at the time the payments were made to Appellant. The weight of authority holds that the assets are to be valued at their worth as a going concern. Thus, in *Butler* v. *Goembel*, 143 Fed. 295, at page 297, the Court says:

> "The valuation for the test of solvency or insolvency under the issue must relate to the conditions, as a going concern, when the alleged preference was given and not to the mere dead matter of the plant after bankruptcy intervened * * *."

To the same effect:

> *Haas* v. *Sachs,* 68 Fed. (2d) 623;
> *Peck* v. *Whitmer,* 231 Fed. 893;
> *Mansfield Lumber* v. *Sternberg,* 38 Fed. (2d) 614.

Nevertheless, we repeat, even if this item be eliminated from consideration for the sake of argument, the proof adduced by the Trustee did not establish that Appellant received a preference in fact.

We respectfully maintain that the Circuit Court of Appeals has placed an unwarranted and untenable interpretation upon subdivisions (a) and (b), Section 60 of the Bankruptcy Act. The Circuit Court of Appeals in its opinion states that:

> "Whether a creditor of an insolvent has received an unlawful preference is not to be determined by what the situation would have been if the estate had been completely liquidated and distributed among all the creditors at the time when the alleged preferential payment was made, but upon whether the ultimate result of a payment by a known insolvent 'will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class'" (R., p. 91, fol. 131).

The opinion points out that:

> "though the proof did not show that when it was paid the $1,000 or 1/3d the amount then due it, the assets were insufficient to pay the other creditors 1/3d of the amount of their claims" (R., p. 88, fol. 128)

the payment to the creditor nevertheless constituted a voidable preference because the Appellant by sharing in the division of the bankrupt's estate would receive a dividend. Thus, it contends the ultimate result of the payment would be that the creditor, Appellant, would receive a greater proportion of its debt than other creditors of the same class would receive. The Court below makes the test of voidable preference, the ultimate result of a payment. It gave an illustration in its opinion, based upon an hypothesis, to demonstrate that the final or ultimate result of the payments on account received by Appellant would give it a greater percentage of the assets than other creditors of the same class.

We respectfully say that the Court below fell into error in its interpretation and that the hypothetical example given in its opinion demonstrates the error of its construction to a certainty.

The Court below attempts to justify its conclusion by the provisions of subdivision (a) of Section 60 of the Bankruptcy Act. The pertinent provisions of Section 60 of the Bankruptcy Act (11 U. S. C. Sec. 96) are:

> "(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition * * * made a transfer of any of his property, and the effect of * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class * * *.
>
> "(b) If a bankrupt shall have * * * made a transfer of any of his property, and *if, at the time of transfer* * * * and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent and the * * * *transfer then operate as a preference,* and the person receiving it or to be benefited thereby * * * shall *then have reasonable cause to believe* that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." (Italics ours.)

We believe that the Court below fell into error because of grammatical misconstruction of subdivision (a). The words "will be" as used in subdivision (a) of Section 60, refer to consequences of transactions that will take place after the enactment of the law. They do not refer to the *future* consequences of transactions condemned by this section. This must be so in view of the precise definition of voidable preferences given in subdivision (b) which is clearly at odds with the construction placed upon subdivision (a) by the Court below. If the paragraph contained in subdivision (a) had been written in the present tense rather than the future tense, we believe there would have been no misunderstanding. The language of this section, because it is written in the future tense, has been erroneously construed to give condemnation to future consequences of transactions. When subdivisions (a) and (b) are read together, the intent is plain that transactions to be judged as voidable preferences, are to be judged by the then present consequences of such transactions and not by future consequences.

In any event subdivision (b), which sets forth the terms under which a preference may be avoided and recovered specifically requires that the Trustee prove that *at the time of transfer* the "transfer *then* operate as a preference" and the creditor "*then* have reasonable cause to believe that the enforcement of such transfer would effect a preference." It is clear from its context that subdivision (a) does not govern recovery of voidable preferences from creditors. Any doubt with respect thereto must be dispelled by the fact that the four elements contained in subdivision (a) are contained in subdivision (b) with the addition of the crucial word "then" and the additional requisite of knowledge or reasonable cause to believe on the part of the creditor of the debtor's insolvency; and by the fact that Section 57, subdivision (g), governing the allowance of claims specifies that:

> "the claims of creditors who have received preferences *voidable under section sixty subdivision (b)*

> * * * shall not be allowed unless such creditors shall surrender such preferences * * *." (Italics ours.)

The legislative intent to have subdivision (b) govern the determination of voidable preferences is clear from this section of the act.

The illustration given by the Court below to support its holding, does not in fact support it. The Court below pointed out that if there were a distribution of 50% in this estate to all creditors that the receipt of such sum by Appellant would render the previous payment preferential because by adding such dividend to the previous payment the creditor would receive a greater proportion of his debt than other creditors of the same class would ultimately receive. In effect the Court rules that the filing of a claim in bankruptcy is the factor which converts an otherwise valid payment into a voidable preference. Because, if Appellant had not filed a claim in this bankruptcy proceeding it would not receive any dividend which, when received, would make the previous payment preferential. Such a construction, it is plain, cannot be reasonably inferred from the language of Section 60 of the Bankruptcy Act.

We have this consequence to the Court's decision: That no matter how small the percentage of his claim a creditor may receive from the debtor on account before bankruptcy, and no matter how large the dividend percentage available for distribution to creditors in the subsequent bankruptcy proceeding, the creditor receiving the part payment necessarily gets a preference which may be avoided, if there was another creditor who did not receive as great a percentage of his claim on account and the assets available for distribution to creditors in the bankruptcy proceeding are not sufficient to pay all creditors in full. With bankruptcy, all creditors receive the same percentage of their claims from the assets of the bankrupt's estate available for distribution to them. So that, applying the rule of the court below, were ninety-nine creditors to receive on account, prior to bank-

ruptcy, between 5 and 10 per cent of their claims, with the assets of the debtor sufficient at such time to pay all creditors as much as 99 per cent of their claims, there would, nevertheless, be, in the event of bankruptcy within four months thereafter, a voidable preference in the case of each one of the ninety-nine creditors were it shown that one creditor had received a single penny less than the minimum percentage received by the others on account. Again, where one creditor receives a part payment of 1 per cent of his claim, no other creditors receiving part payments on their claims, the creditor necessarily receives a voidable preference, even though at such time, or in the distribution of the debtor's estate after bankruptcy, the assets are sufficient to pay all creditors 99 per cent of their claims. Surely no such situation was ever contemplated by the framers of the Bankruptcy Act, and it is clearly at war with the plain provisions of Section 60 (b).

Under the rule laid down by the Court below a creditor who receives a part payment would be charged with knowledge of what other creditors have received and may receive up to the time of bankruptcy; what creditors of the same class there would be at the time of bankruptcy; what other creditors may do concerning obtaining part payment of their claims. It would burden such a creditor with the results of speculations on the part of a debtor from the time of payment down to the time of bankruptcy; with losses that the debtor may sustain through fire, robbery, sickness, and other risks of business and life. The creditor would be required to foresee whether market prices would go up or down; whether patents might be invented which would destroy the value of the debtor's business; whether the debtor may lose money or make money up to the time of bankruptcy, and finally the creditor would be charged with knowing what the estate of the debtor would yield after it had gone through the shrinking processes of the bankruptcy courts. We submit that such an onerous rule was never contemplated by the

Congress and can not be fairly inferred from the language of Section 60 of the Bankruptcy Act.

The evidence in this case showed that other creditors could have received 45% of their debt at the time Appellant received only 33% of its debt. *There is no proof in the record that creditors of the same class will receive less than ⅓ of their claims from the bankrupt estate.*

Furthermore, in this case, it appears that the creditor, Appellant, received the total of $1,000 during a course of about six weeks between April 24th and June 16th, 1933; that the largest payment on account represented less than 10% of the total claim; and most of the payments represented payments on account of about 3% each. We have shown that the aggregate of the payments made amounted to less than ⅓ of the total claim of Appellant and that the aggregate was not preferential in fact. *A fortiori* each individual payment when made certainly did not represent a greater proportion of the Appellant's claim than other creditors of the same class could then have received. The case of *W. S. Peck & Co.* v. *Whitmer,* 231 Fed. 893, from which we quote later, is authority for the proposition that it is necessary for the Trustee to prove in such case that each of the payments so made were, by themselves, preferential in fact; and that at the time that each particular payment was made the creditor had knowledge or reasonable cause to believe that the enforcement of the payment would effect a preference.

The weight of authority is contrary to the holding of the court below.

Haas v. *Sachs,* 68 Fed. (2d) 623;
W. S. Peck & Co. v. *Whitmer,* 231 Fed. 893;
Mansfield Lumber Co. v. *Sternberg,* 38 Fed. (2d) 614;
Herzberg v. *Riddle,* 171 Alabama 368;
Slayton v. *Drown,* 93 Vermont 290;
Brittain Dry Goods Co. v. *Bertenshaw,* 66 Kansas 734;
Remington on Bankruptcy, Sec. 1812.

The cases of *Haas* v. *Sachs* and *Mansfield Lumber Co.* v. *Sternberg* are cited with approval by this Court in the case of *Adams* v. *Champion,* 294 U. S. at page 235, 55, S. C. at page 401.

In the case of *Haas* v. *Sachs* (C. C. A.—8th Cir.), 68 Fed. (2nd) 623, at pages 625, 626, the Court, in construing this section of the bankruptcy law in a case where a creditor received *part payment* of its claim said:

> "Appellant received in this payment exactly 10% of his claim. * * *
>
> "In this condition of the record, appellant contends that at the time he received the $2,000.00 payment, the bankrupt had assets more than sufficient in value to pay 10% of all his indebtedness, and hence it is argued there was no voidable preference. * * *
>
> * * * * *
>
> "If enough assets remain after a transfer to one creditor to give other creditors in the same class as great or greater percentage of their claims, then no voidable preference results. *W. S. Peck & Co.* v. *Whitmer* (C. C. A. 8), 231 F. 893, 897; *Mansfield Lumber Co.* v. *Sternberg* (C. C. A. 8), 38 F. (2nd) 614, 617.
>
> "This Court has held that whether the effect of the transfer will be to enable the creditor receiving it to obtain a greater percentage of his claim than other creditors of the same class, is to be determined as of the date of the actual transfer, and not as of some future date when later events have altered the assets or liabilities, or when court liquidation may have caused shrinkage of values and other losses."

The same Court passed upon the case of *Peck* v. *Whitmer,* 231 Fed. 893, which case involved also the question as to whether a creditor who received a *series of part payments* of his claim, obtained a voidable preference. The creditor in that case received partial payments within the proscribed period, aggregating about eighteen (18%) percent of its claim. The payments were made about a week apart. It was shown that there was sufficient assets even at bankruptcy

to make a payment of thirty (30%) percent to all creditors of the same class and that at the time the payments were made to the creditor, the estate if then liquidated would have paid sixty (60%) percent to all creditors. The Court there held that the creditor had not received a preference and that in determining whether a preference is obtained by a creditor who receives a part payment, the estate of the debtor or bankrupt at its value at the time of the transfer is the test of preference, and not the value of the estate after bankruptcy. It also held that where part payments are made, the value of the estate at the time of each particular payment was the test as to whether each particular payment effected a preference. We quote from the opinion of *Peck* v. *Whitmer:*

> "It thus appears that it is not sufficient to defeat the allowance of the claims of appellants that they received preferences as defined by law, but it also must appear that at the time the payments were made appellants had reasonable cause to believe that the enforcement of the payment or transfer would effect a preference.
>
> "Therefore, the burden of proof was upon the trustee to show by a fair preponderance of the evidence (1) that the bankrupt was insolvent at the time the several payments were made; (2) that the payments so made enabled appellants to receive a larger percentage of their respective debts than any other creditor of the same class; (3) *that at the time each particular payment was made, appellants had reasonable cause to believe that the enforcement of the payment or transfer would effect a preference.*
>
> "Where in any particular case it is shown that a creditor at the time he receives full payment of his debt knows that his debtor is insolvent or has knowledge of such facts, which investigated would show insolvency, it necessarily results that the creditor had reasonable cause to believe that the enforcement of the transfer would effect a preference. But in a case where the transfer or payment amounts to but a small percentage of the total debt, knowledge of the insolvency of the debtor or of facts which if investigated

would lead to such knowledge is not conclusive upon the question as to whether the creditor had reasonable cause to believe that the enforcement of the transfer or payment would effect a preference.

* * * * *

"It thus appears that the insolvency must exist at the time of the transfer, and the transfer must then operate as a preference and the creditor must then have reasonable cause to believe that the enforcement of the transfer would effect a preference. Let us assume that the record shows that the bankrupt was insolvent at the time the several payments were made, and that appellants had knowledge of such facts, which if investigated would have led to a knowledge of the insolvency, there would still remain to be established two important and material facts, viz., that the payments at the time they were made to appellants enabled them to receive a larger percentage of respective debts than any other creditor of the same class, *and that at the time each particular payment was made appellants had reasonable cause to believe that the payments would have this effect.* The enforcement of the transfer when such transfer is in the form of the payment of money simply means if the payment shall stand as a legal payment.

"We fail to find any evidence in the record that the appellants at the time they received the several payments had reasonable cause to believe that the enforcement thereof would effect a preference.

* * * * *

"Taking the record as it stands, how could the appellants be held to have believed that if the estate of the bankrupt had been distributed at the time of these payments it would not have given every creditor a greater percentage of their debts than they were receiving. The estate of the bankrupt at the time the payments were made would have paid about 60 percent. on the dollar. The creditor who receives a partial payment on his debt, so far as the question of his having reasonable cause to believe that the enforcement of the payment would effect a preference is concerned has the right to look at the bankrupt's estate

> at the time the payment is made, bankruptcy may never occur; but if it does, the creditor may not be charged with a knowledge of what an estate will pay out after it has undergone the shrinking process of the courts." (Italics ours.)

This doctrine is supported by the authorities. Black, on Bankruptcy, at pages 622, 623, says:

> "If the creditor knows or has reasonable ground to believe that the debtor is insolvent, then it may be inferred without further proof that he also has reasonable ground to believe that the enforcement of the judgment or transfer which he takes will effect a preference, such being its natural and inevitable result, at least if the payment, transfer, or security puts him in a position to collect the whole amount of his claim. But if the preference alleged consists only in giving to one of the creditors a part of the amount of his claim, then he must have reasonable ground to believe that other creditors will not be able to secure so large a dividend, and even positive knowledge of the debtor's insolvency may not be sufficient to warn him of this. For though the debtor may not be able to pay his debts in full, yet he may be able to pay to all his creditors at least as large a share of their claims as goes to the creditor alleged to have been preferred."

Similarly, in Gilbert's Collier on Bankruptcy (2nd ed.), on page 895 it is said:

> "If the transaction results in the *pro rata* distribution of the debtor's estate among all his creditors it does not create a preference, although the creditor had notice of the debtor's insolvency."

This problem was also passed upon in the case of *Herzberg* v. *Riddle,* 171 Ala. 368, where on page 374 the Court said:

> "If a man's debtor who is solvent pays him his debt in full, surely there is no ground to suspect a preference because every other debtor can compel payment; but if he accepts all of his debt, *or a large part thereof,* from a debtor known or suspected to be hopelessly

insolvent, then he may know or have reasonable cause to believe that a preference is made * * * But, if he accepts only that part of his debt to which he would be entitled if all the property liable to the debts should be apportioned among the creditors, then, of course, there is no preference * * * though the debtor may be hopelessly insolvent." (Italics ours.)

In the case of *Slayton* v. *Drown,* 93 Vermont 290, the Court, in construing these provisions of the Bankruptcy Act, said:

"The fault in the plaintiff's contention that the payment received by the alleged preferred creditor is to be measured by what the other creditors received on the final settlement of the bankrupt estate is apparent when considered in connection with a few familiar illustrations. Suppose that, after the alleged payment, the debtor in the meantime mismanages the business, or successfully conceals a portion or the whole of his property, or a fire destroys his assets, or a world war ruins his business, and that, in the final settlement, the expenses of the management and settlement of the estate, involving an expensive litigation, leaves nothing, or only a small part to be distributed among the other creditors, in such circumstances, could it be said that a creditor having received a payment on his debt of no greater percentage than the bankrupt was 'then' able to pay all his other creditors of the same class was a preference, and such fact reasonable ground to believe that such payment would effect a preference even though it should ultimately turn out on the closing up and final settlement of the bankrupt estate that nothing or only a small per cent., much less than the per cent. paid the alleged preferred creditor, was left to pay the other creditors? Can it be reasonably inferred that it was the intention of Congress in the passage of the Bankruptcy Act to make a payment of the bankrupt to one of his creditors, of a sum not exceeding a per cent. which he was able to pay from his assets subject to the payment of his debts, to each of his other creditors, a preference voidable by the trustee? Must the preferred creditor be charged with a belief that no

one would have entertained at the time the payment was made? We think the act was not passed with any such result intended. It cannot be conceived that the act contemplated that the creditor receiving a payment from an insolvent debtor should be charged with reasonable cause to believe that the payment would effect a preference, when, if the exact facts had been known to him at the time the payment was made, they would not have disclosed that the payment was a preference. To establish that the defendant had reasonable cause to believe that the payment would effect a preference, the burden was upon the trustee to show that such was the effect of the payment at the time it was made; for otherwise there would be no basis for the belief.

"In the case at bar the plaintiff's own evidence disclosed that the payment to the defendant was of no greater per cent. of his debt than the insolvent was 'then' able to pay to his other creditors. Indeed, he could have paid to them a much larger per cent. of their debts at that time than he paid to the defendant, while up to the present time no one knows what the bankrupt's estate will be able to pay the creditors on final settlement.

"The portion of the charge excepted to made the recovery to depend, not upon the defendant's having received a greater percentage of the bankrupt's estate than other creditors of the same class would have received if the assets had then been distributed *pro rata* but upon his having received more than other creditors of the same class might ultimately receive on the final settlement of the estate. As we have seen, this was error, and harmful error, and the exception to the charge must be sustained."

The Court below relies upon *Commerce Guardian Trust & Savings Bank* v. *Devlin*, 6 Fed. (2d) 518 (C. C. A.—6) as supporting its construction of Section 60 of the Bankruptcy Act. This case states no rule for determining preferences. The remarks of the Court in that case at page 537:

"We see no merit in the suggestion that the bank got no greater percentage on its own claim (about 48 per

> cent.) than creditors generally would have had, if we accept the estimate of 50 per cent. made by the bankrupt's bookkeeper. The bank actually received 100 per cent. on $6,300 of its claim, and, if the preferences were upheld, would be entitled to receive upon the balance of its claim the same percentage as other creditors of the same class."

are difficult to understand. Is not every part payment 100 per centum of itself? How can it be anything else? If that be the test, then a part payment of one per centum of a debt would be preferential because, standing by itself, it is 100 per centum of itself; and thus would be voidable even though the debtor's estate could, at the time of payment, have paid all other creditors 99 per centum of their claims.

The trustee contended in the Court below that because appellant refrained from further participation in the proceeding after the Referee permitted its notice withdrawing the claim to be filed, that the order entered by the Referee was in the nature of a default order and, therefore, not appealable. We respectfully submit that this contention is without merit.

Appellant duly took exception to the ruling allowing the trustee to proceed with his evidence (R., p. 61, fol. 83). The only way by which an aggrieved party may review a ruling of a referee, under the Bankruptcy Act, is by petition for review to the District Court (Bankruptcy Act of 1898, *Sec. 2,* subd. 10). This procedure was duly taken by appellant to review the ruling of the Referee denying its application to withdraw and holding that it had received a preference (R., p. 78).

There was no default suffered by appellant. Failure to participate further in a trial is not a default. Thus, it has been held that one who applies for an adjournment, which is denied, has participated in the trial and can only review the ruling by appeal from the judgment.

> *Citizens Trust Co.* v. *Prescott,* 221 App. Div. 426 (N. Y.);

King v. *Ross,* 28 App. Div. 371 (N. Y.);
Altschuler v. *Lipschitz,* 113 N. Y. Supp. 1058.

Moreover it is well settled that the proof of debt makes out a *prima facie* case. *Whitney* v. *Dresser,* 200 U. S. 535. Appellant had filed its proof of debt and thus made out a *prima facie* case. The burden of proof rests upon the trustee to establish the defense whereby the claim is sought to be expunged. The failure to produce such evidence prevents the Referee and the District Court, from expunging the claims. *Whitney* v. *Dresser,* 200 U. S. 535. We contend that the Trustee has failed, as a matter of law, to adduce evidence sufficient to establish its defense of preference. The ruling sustaining this defense could only be reviewed by petition to review in the District Court.

CONCLUSION.

THE ORDER APPEALED FROM SHOULD BE REVERSED, AND THE APPLICATION OF APPELLANT TO WITHDRAW ITS PROOF OF CLAIM SHOULD BE GRANTED WITH COSTS.

Respectfully submitted,

MAXWELL H. GOLDSTEIN,
Counsel for Appellant,
Bronx Brass Foundry, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 232.

BRONX BRASS FOUNDRY, INC.,
Petitioner,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. PALMENBERG'S SONS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD F. UNGER,
Respondent's Counsel.

GALLO & ACKERMAN, Inc., 142 Liberty Street, Telephones—REctor 2-5356-7

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals (R., 126-131) is reported in 76 Fed. (2d) 935.

Jurisdiction.

The order sought to be reviewed was entered on April 22nd, 1935 (R., 131). On July 9th, 1935, petitioner filed a petition for a writ of certiorari, invoking the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended.

Summary Statement of Matter Involved.

The order of the Circuit Court of Appeals affirmed the District Court's order affirming an order of the Referee in Bankruptcy which denied the application of the petitioner herein for leave to withdraw its claim against the bankrupt estate, and expunged the claim, unless, within twenty days there be paid to the trustee the sum of $1,000 and interest (R., 126-131).

The petition in bankruptcy was filed on July 18th, 1933 (R., 6, fol. 17). On September 25th, 1933, the creditor-petitioner herein filed its proof of claim against the bankrupt estate in the sum of $2,100 (R., 2), which as admitted by petitioner in its petition for a writ (R., 1), represents the balance remaining due on the original indebtedness of $3,100 after deducting $1,000 received on account. Petitioner herein admitted that the $1,000 claimed as a preference was received in several payments, by way of post-dated checks, within the four-month period prior to the adjudication in bankruptcy (R., 12, fol. 36).

On January 5th, 1934, the trustee filed objection to the claim upon the ground that the creditor had received a preference of $1,000 (R., 6-8). There were ten hearings upon the objection to this claim from February 2nd, 1934 (R., 11, fol. 31), until May 18th, 1934, when the application to discontinue was made (R., 76, fol. 228). The Referee denied the application to withdraw (R., 82, fol. 246). The petitioner withdrew from the hearing, but the respondent continued and completed its evidence in the case (R., 83, et seq.). The Referee finally entered an order expunging the claim unless $1,000 with interest was surrendered (R., 106). The District Court affirmed this order and dismissed the petition to review (R., 112). Upon appeal to the Circuit Court of Appeals, the order appealed from was affirmed (R., 131).

Questions Presented; Summary of Argument.

The petitioner contends that this appeal presents to this Court the following questions:

(A) Did the petitioner have the right to withdraw its proof of debt in this case after the objection by the trustee upon the ground that a preference had been received, and after the hearings upon the issue of preference had virtually been completed?

(B) Do the facts in this case indicate, as a matter of law, that no unlawful preference was received by petitioner herein?

Our argument will demonstrate that the Circuit Court of Appeals did not err and that the petition for a writ of certiorari should be denied.

I. The record below does not present any questions reviewable by this Court.

II. The Courts below properly exercised their discretion in denying petitioner's application to withdraw its proof of claim.

III. The record herein supports the finding that there was an unlawful preference.

POINT I.

The record below does not present any questions reviewable by this Court.

The following are the jurisdictional objections to the granting of the writ:

a. The order below is an affirmance of a default order entered by the Referee, and is not appealable.

b. This Court should not disturb the finding of preference upon the record herein.

c. This Court should not review the discretion of the Courts below in refusing to permit a withdrawal of the proof of claim.

a. *The Order Below Is An Affirmance of a Default Order Entered by the Referee and Is not Appealable.*

The petition admits, and the record establishes, that petitioner abandoned the proceeding despite the ruling of the Referee that no leave to discontinue would be granted (R., 82, 83, fols. 246-247). The proceedings continued and respondent offered testimony (R., 83, fols. 249, et seq.) in the absence of petitioner for the purpose of completing its proof. The order herein is therefore one on default. The law is clear that where a party defaults and an order or decree is entered thereupon, the defaulting party cannot question the insufficiency of testimony upon an appeal from the order entered on default, but it is necessary to make an application to vacate or modify the decree or order and to open up the default of the party.

An appeal may lie only from the order denying the application to vacate or modify the default decree or order.

Ohio Central Railway Co. v. *Central Trust Co.*, 133 U. S. 83;
Masterson v. *Howard*, 18 Wall. 99.

Whether or not the default is suffered before any testimony is taken by the other side or in the midst of the hearings should be of no consequence and the rule above stated is directly applicable to the instant case. It is there-

fore submitted that the petitioner's contention that the record does not establish a preference under the Bankruptcy Act cannot be considered upon this appeal. It is further submitted that the appellant cannot raise the question of the right to withdraw said claim upon this appeal.

b. *This Court Should Not Disturb the Finding of Preference Upon the Record Herein.*

The petitioner's contention that the decision of the Circuit Court of Appeals below is in conflict with that of other circuits is not correct upon this record. The Circuit Court of Appeals in its opinion stated that the evidence "is not altogether certain that, if the assets existing at the time of such payment had been applied to the payment of all the creditors, the Bronx Brass Foundry, Inc., would have received more than its pro rata share." The Court finally held that the petitioner herein had received an unlawful preference and that said fact was not to be determined by the situation that would have existed if the estate had been completely liquidated at the time of the transfer but upon whether the ultimate result of a payment by a known insolvent "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class" (§60 (a) Bankruptcy Act).

It is submitted that the record contains substantial evidence to indicate not only insolvency but also that at the time of the transfer the *pro rata* share of the assets that would have been received by general creditors was much less than the monies received by the petitioner herein. The facts with respect to the issue of preference will be discussed hereafter (p. 8). These facts will substantiate the finding of preference upon the theory of all the cases and the Bankruptcy Act, and establish that this Court should not upset the order below on the weight of the evidence.

c. *This Court Should Not Review the Discretion of the Courts Below in Refusing to Permit a Withdrawal of the Proof of Claim.*

The respondent respectfully submits that considing all the facts in this case, the stage of proceedings, the legal prejudice to the trustee and creditors of the estate (see analysis of same hereafter, Point II), the Courts below properly exercised their discretion to deny leave to withdraw the claim. This Court should not assume jurisdiction to disturb such discretion of the lower Courts.

State of Alabama v. *United States,* 279 U. S. 229.

POINT II.

The Courts below properly exercised their discretion in denying petitioner's application to withdraw its proof of claim.

The petitioner's claim that the decision of the Circuit Court of Appeals below is in conflict with the case of *Scholl Manufacturing Co., Inc.,* v. *Rodgers,* 51 F. (2nd) 971 (C. C. A. 8th), is not correct. In the *Scholl Manufacturing Co.* case application for leave to withdraw the claim was made after the objections were filed by the trustee but prior to the time that any hearings were held upon the matter. It may be argued that a seasonable application to withdraw a claim should be granted as a matter of discretion because the prejudice to the trustee is not substantial. But the facts in the instant case justify the exercise of the discretion to deny leave to withdraw the claim.

The case of *Ex Parte Skinner & Eddy,* 265 U. S. 86 is not in conflict with the decision below since that case merely restates the general rule that a party has the right to

discontinue an action unless same would "prejudice the defendant in some other way than by the mere prospect of being harassed and vexed by future litigation of the *same kind.*" (Italics ours.)

In the instant case the trustee will be prejudiced in a manner other than by the prospect of being harassed by future litigation of the same kind. After a discontinuance is granted the trustee will have to institute a plenary action and try the case with full testimony. Certainly the Supreme Court does not refer to our situation. In the usual case where a counterclaim is interposed a discontinuance of the action might make necessary separate actions by the defendant and plaintiff. Yet the Supreme Court does hold that where a counterclaim has been interposed the necessity of an action by the defendant is prejudice warranting denial of leave to discontinue by the plaintiff (Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138).

The Supreme Court is therefore obviously referring to the vexation by future litigation that would be instituted by the parties upon the same cause as the discontinued action; but where the discontinuance of an action makes necessary the institution of an action by the defendant and a full trial, along with a possible new action by the plaintiff on the discontinued case, then leave to discontinue may be denied as a matter of discretion. To permit the withdrawal of the claim would prejudice the trustee herein in a way other than the mere prospect of being harassed by the future filing of a claim by the petitioner-creditor herein. The trustee would be deprived of the affirmative right to obtain an adjudication that the $1,000 received by the petitioner-creditor herein was an unlawful preference. The opinion of the Circuit Court of Appeals very clearly presents the argument of the respondent in connection with this point (R., 128-129).

The petitioner's contention that a question is presented as to whether the District Court can enact a rule with

respect to discontinuances, is unsound. This Rule II of the Southern District (R., 129) is an *equity* rule which permits discontinuance, even in the absence of a counterclaim.

This record does not present this question of law to this Court, inasmuch as the Court below merely uses this rule as an analogy since the proceeding herein is one in *bankruptcy*. Moreover, the facts in the instant case indicate that the trustee herein is entitled to affirmative relief to the extent of obtaining an adjudication that the petitioner has received an unlawful preference. This rule specifically refers to cases where the defendant requests no affirmative relief.

POINT III.

The record herein substantially supports the finding that there was an unlawful preference.

The petitioner admits that it received $1,000 between April 24th and June 16th, 1934 (R., 12, fol. 36). In March, 1934, a meeting of the principal creditors of the bankrupt was called, at which petitioner and its attorney, Maxwell Goldstein, Esq., were present (R., 13, fol. 39; R., 31, fol. 92). The petitioner and its attorney were told that the bankrupt herein was insolvent (R., 14, fol. 40). The petitioner and its attorney refused to consent to an extension agreement of all creditors and the petitioner's attorney insisted that the petitioner's claim be purchased by creditors (R., 17, fol. 51). A statement of the condition of the company (Trustee's Exhibits 2 and 3, R., 95-97) was shown to the petitioner and its attorney (R., 39, fol. 117). An examination of this financial statement, particularly by petitioner's attorney, who is also an accountant (R., 37, fol. 128) clearly indicated that the bankrupt was hopelessly insolvent. The figure of "good will, pat-

ents and trademarks—$400,000''—had no value whatsoever and had been kept on the books for many years (R., 60, fols. 179-193). The petitioner was told and knew that the item of machinery and fixtures was of little value (R., 44, fol. 131; R., 35, fol. 134). The accounts receivable were in bad shape (R., 26, fol. 76). There were payroll and salaries due of over $7,500 and taxes of over $2,000, all of which were priority claims in case of liquidation, either under State or Federal practice (Trustee's Exhibits 2 and 3, R., 95-97). The petitioner knew that upon liquidation, only a nominal dividend would be paid (R., 43, fol. 129; R., 49, fol. 146). The petitioner knew and actually insisted upon receiving a preference inasmuch as it had not dealt with the bankrupt for as long a period as the other creditors (R., 34, fol. 102; R., 48, fol. 144).

It is therefore submitted that under any definition of unlawful preference, it is apparent that the petitioner received more than the *pro rata* share that would be received by creditors of the same class if a distribution had been made at the time the preference had been received.

It is submitted that the facts in this case warrant a holding of unlawful preference, even under the interpretation as set forth in the case of *Haas* v. *Sachs* (see petitioner's writ, p. 7).

In *Haas* v. *Sachs*, the evidence conclusively established that at the date of the hearing, the assets of the estate had been liquidated so as to award a dividend of 20% to creditors, whereas the money received by the creditor whose claim was objected to in said case was merely 10% of his claim.

In any event, it seems clear that where a creditors has received assets knowing of the debtor's insolvency *and then files a claim for the balance against the bankrupt estate,* that said creditor will receive a preference. This was illustrated by the Court in its opinion below (R., 130). No matter what the dividend may be, inasmuch as the assets heretofore received by the creditor with knowledge of

insolvency were applied as a 100% payment of part of the creditor's claim, receiving an equal dividend with other creditors upon the balance of the claim would result in a preference to said creditor. There may be a distinction and room for a different rule where the trustee brings an affirmative action to recover a preference and where no poof of claim has been filed. By failing to file a claim, that would be an indication that the assets received were taken in full satisfaction of said claim. Where no proof of claim is filed and an action is brought to recover a preference, the test might be made as to whether the assets received by the creditor in full satisfaction were larger than the *pro rata* share that said creditor would have received if the assets had been distributed at said time. But where a proof of claim is filed, as in the instant case, if the assets were received with knowledge of insolvency, the effect of approving said claim would be to permit said creditor to receive more than creditors of his class.

CONCLUSION.

The application for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD F. UNGER,
Respondent's Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 232.

BRONX BRASS FOUNDRY, INC.,

Appellant,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. Palmenberg's Sons, Inc.,

Respondent.

BRIEF FOR RESPONDENT

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ARNOLD A. JAFFE,
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IN THE

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Respondent.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND DISTRICT

BRIEF FOR RESPONDENT

Opinions Below

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 76 Fed. (2nd) 935, and is found on page 87 of the transcript of record.

Statutes Involved

Section 60 of the Bankruptcy Act provides:

A. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

B. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and, if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Statement of Facts

The trustee in bankruptcy sought to expunge the claim of Bronx Brass Foundry, Inc., on the ground that the creditor had received payments on account, amounting to $1,000, which had been paid and received in such manner as to constitute a voidable preference (R., p. 4).

The creditor filed an answer to this petition (R., p. 5) in which it admitted, by failure to deny, paragraph "3" of the trustee's petition, as follows:

> "3. That within four months prior to the date of the filing of the petition in bankruptcy herein, and while the bankrupt was insolvent and indebted to divers creditors of the same class upon unsecured indebtedness provable in bankruptcy, and while knowing that the bankrupt was insolvent, said bankrupt transferred and paid over to the said Bronx Brass Foundries, Inc., the sum of $1,000.00" (R., p. 4).

The answer denied all other material facts (R., p. 5). On these issues, the trustee and the appellant proceeded to trial.

The trustee proved the following facts:

Seven payments on account had been made to the appellant, by the bankrupt, totalling $1,000, within a period of four months from the bankruptcy (R., p. 7).

On April 1st, 1933, within the four months and shortly before the payments were made, the bankrupt's capital had a book value of $243,745.37, after including an item of "good will, patents and trademarks" as an asset to the extent of $400,000 (Trustee's Exhibit 4, R., p. 74).

This item of good will, etc., at one time represented patents and trade marks which no longer had any value (R., p. 24). Eliminating the "good will", the bankrupt was insolvent to the extent of $156,254.63 (R., p. 74).

The payments to the creditor were made in May and June, 1933, and bankruptcy occurred on June 18th. It was alleged in the trustee's petition, and not denied in the answer, that, at the time of the payments, the bankrupt was insolvent.

The appellant had reasonable cause to believe that the payments would effect a preference, as appears from the following facts:

In March, 1933, the bankrupt called a meeting of its creditors and requested an extension of time to pay its debts (R., p. 8). At that meeting, the appellant was represented by Mr. Goldstein, its attorney (R., p. 8). A statement was made by one of the other creditors that the concern was "bankrupt" (R., p. 9). Figures were submitted at that meeting (Trustee's Exhibit 3; R., p. 72) (introduced at R., p. 21) and shown to the people there and discussed (R., p. 16).

The statement was of March 1st, 1933, and showed total assets, including good will, of $539,734.74 (R., p. 72). Deducting the $400,000 of good will, the book assets were only $139,734.74, whereas the liabilities amounted to $285,357.88 (R., p. 73).

The creditors were told that the business could not continue unless there was a definite extension of time, and it was assumed that the company was insolvent as shown by the statement (R., p. 24).

With regard to an extension of time, the appellant's representative said that his clients had not dealt very long with the Palmenberg's Company and they felt that they were entitled to preference on that account, over the older creditors (R., p. 25). The word "preference" was used by the appellant's representative.

The Bronx Brass Foundry commenced suit on its claim on March 15th, 1933 (R., p. 27). An answer was interposed and the plaintiff made a motion for summary judgment (R., p. 27).

Then the payments on account commenced and as each payment was made, the motion for summary judgment was adjourned (R., p. 27). The checks (Trustee's Exhibit 1; R., p. 68) were the checks of the bankrupt, to the order of Maxwell H. Goldstein, the attorney for the Bronx Brass Foundry. They were dated respectively:

April 24, 1933	$250
May 1, 1933	$250
May 19, 1933	$100
May 26, 1933	$100
June 9, 1933	$100
June 16, 1933	$100

There was another check for $100 which was not produced, but conceded (R., p. 7).

Two days after the last check was given, petition in bankruptcy was filed against the bankrupt.

After the trustee had proved all of the foregoing facts, the Bronx Brass Foundry sought to withdraw its claim (R., p. 59) and it filed a document which was called "notice withdrawing claim" (R., p. 6). Counsel for the creditor stated "We make no claim now in this proceeding against the J. R. Palmenberg's Sons, Inc. In other words, it is in the nature of a discontinuance" (R., p. 60). Upon the objection of the trustee, the referee held that the trustee might continue with proof on his objection to the claim, despite the attempted withdrawal (R., p. 61).

Thereupon, the attorney for the creditor withdrew and took no further part in the proceedings (R., p. 61).

Thereafter, the only testimony given was that of a certified public accountant, Matthew Jacobs (R., p. 62) who testified as to the assets and liabilities on April 1st, 1933, which testimony had already been covered in a general way by previous witnesses.

The referee found in favor of the trustee and ordered that the claim should be expunged unless the creditor sur-

render the preferential payment in the sum of $1,000 (R., p. 66).

That determination has been affirmed by the Circuit Court of Appeals and the matter comes before this court on certiorari.

Summary of Argument

A.

Respondent contends that the creditor had no absolute right to withdraw his proof of debt.

The proceeding to expunge the claim was instituted by the trustee and, in that proceeding, the trustee was the aggressor, seeking adjudication that a voidable preference had been received. The trustee should not be deprived of its right to such adjudication by the withdrawal of the defendant party. After the trustee had presented testimony practically proving its entire case, the estate should not be subjected to the delay and expense of re-litigating the issues. The trustee, as a representative of the creditors, would be prejudiced by any such delay or expense.

B.

The preferential effect of a partial payment must be determined by the actual distribution in bankruptcy, and not by some imaginary distribution at the time of payment.

One main purpose of the Bankruptcy Act is to insure equality among creditors of the same class in the actual distribution of the assets as of the date of bankruptcy. Payments on account are to be judged according to their effect on this actual distribution and not according to some imaginary distribution at the time of payment.

Argument

A.

The denial of the application to withdraw the proof of claim is not erroneous. In bankruptcy matters, delay and duplication of work and expense are prejudicial.

The creditor did not seek to withdraw its proof of claim until the trustee had introduced almost all of its evidence. Before the motion to withdraw was made, the trustee had proved the following material facts:

1. Payments aggregating $1,000 made by the bankrupt to the creditor (R., p. 7).
2. Knowledge on the part of the creditor of the bankrupt's failing condition, prior to the payments (R., pp. 8-22).
3. Circumstances surrounding the payments, showing intent to prefer, and the creditor's knowledge thereof (R., pp. 25, 38-42).
4. Insolvency of the bankrupt at the time of payments (R., p. 24),

This proof practically completed the trustee's case. After the withdrawal, the trustee called only one witness, a certified public accountant (R., p. 62) who testified in more detail concerning the financial condition of the bankrupt at or about the time of the payments in order to establish its insolvency.

The trustee had initiated this proceeding by a petition to expunge the claim (R., p. 4) on the ground that a voidable preference had been received. The creditor answered that petition (R., p. 5) denying certain allegations and admitting others by failure to deny.

On these issues, the trustee had the burden of proof and came into court *qua* plaintiff. It asked relief from the court in two respects:

First, an adjudication or finding that a voidable preference had been received. Second, a decree expunging the claim unless the preference was surrendered.

The creditor defended itself against this attack and came into court *qua* defendant.

It has been assumed that the creditor in this proceeding occupied the status of plaintiff and that the trustee occupied the position of defendant. Such a position of the parties might well have prevailed at the time of the filing of the proof of claim and before its proof or allowance. Once the claim had been proved or allowed, the status of the creditor was fixed until and unless some attack was made on that claim by the trustee.

Whitney v. *Dresser,* 200 U. S. 535.

After the trustee has commenced the proceeding to expunge the claim and has petitioned the court for affirmative relief by way of a decree as to the voidable preference, it is too late for the creditor to avoid such a decree by the voluntary withdrawal of the claim. To do so would be equivalent to permitting a defendant to discontinue an action which has been brought against him.

But even if we regard the creditor as plaintiff and the trustee as defendant, nevertheless, the creditor has no absolute right to discontinue, but its right to do so, whether at law or in equity, is subject to the limitation that the discontinuance shall cause no legal prejudice to the other party.

This court has held that in an action at law, the defendant may not oppose discontinuance solely on the

plea that he will be subjected to the annoyance of further litigation on the same claim.

Ex parte Skinner & Eddy, 265 U. S. 86.

The proceeding now under review is not an action at law, but arose in bankruptcy and is equitable in nature. The hearing had progressed to a point where the trustee might have rested and demanded a decree in its favor. Its right to receive such a decree is a substantial right and a discontinuance would deprive it of that right and would constitute serious legal prejudice.

It is true that some courts have extended the rule of *Ex parte Skinner & Eddy* to bankruptcy proceedings.

Scholl Mfg. Co. v. *Rodgers,* 51 Fed. (2nd) 971, C. C. A. 8;
Deeley v. *Cincinnati,* 23 Fed. (2nd) 920, C. C. A. 6.

In doing so, however, we believe that these courts have failed to draw the vital distinction between the proceeding in bankruptcy and other actions at law or in equity.

The trustee in bankruptcy, representing as it does, the interest of all the creditors in the administration of the estate, occupies a different position from that of the ordinary litigant. The trustee is charged with the duty of administering the estate for the benefit of creditors as expeditiously as possible to the end that the assets which have been sequestered by the court may be released to the equitable owners thereof, namely, the creditors, and without unnecessary delay.

After the claimant compels the trustee to go to the expense of procuring and producing evidence, the claimant should not be permitted to render that effort abortive and the expense fruitless by a voluntary withdrawal of its claim before the issues can be decided. Such tactics

on the part of the claimant react to the prejudice of the bankrupt estate and its creditors.

Delay for many months may be incurred if the trustee is now compelled to institute a plenary suit and to relitigate the issue of the voidable preference. If the decree of the Bankruptcy Court remains in effect, there has been a binding adjudication on all the material issues, and while a plenary suit would have to be instituted to recover the preferential payments, the creditor could interpose no valid defense and judgment in that action would be granted in summary fashion without delay.

At a time when we are all striving to minimize the delays and expense of litigation, particularly with reference to insolvent and bankrupt enterprises, it would be strange to hold that in bankruptcy matters the delay and expense involved in a relitigation of issues is not legally prejudicial to the trustee and the other creditors.

B.

The preferential effect of a partial payment must be determined by the actual distribution in bankruptcy, and not by some imaginary distribution at the time of payment.

The court is asked by the appellant to construe Section 60 B so as to have it read:

> If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of transfer, * * * and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent and the * * * transfer then operate as a preference (so that its effect will be to enable the person receiving it to obtain a greater percentage of his debt than any other creditors of the same class could have received if the assets were then distributed) and etc. it shall be voidable by the trustee, etc.

There is nothing in the Act to warrant any such definition of preference.

Section 60 A contains a definition of "preference".

Carson, Pirie & Scott v. *Chicago Title & Trust Co.*, 182 U. S. 438.

That definition contemplates a test of equality to be made at the time of bankruptcy and at no other time. The definition of "preference" contained in Section 60 A must be read with Section 60 B, wherever the word "preference" occurs.

Sections 60 A and 60 B must be read together, and they must be so read in the light of the all-prevailing purpose of the Bankruptcy Act.

One of the main purposes of the Bankruptcy Act is to provide for equal division of the assets among the creditors. An actual division is, of course intended—not some imaginary or theoretical distribution. Equality is to be made real as far as possible.

In order to insure real equality in distribution as of the date of bankruptcy, a marginal period of four months has been arbitrarily fixed by the courts so that equality may not be disturbed by the grasping demands of the vigilant during that penumbral period.

Always, however, the goal is equality of distribution in bankruptcy and the four months' truce must be interpreted and construed with that goal in mind.

The word "then" in the phrase "and the transfer then operate as a preference" has misled and confused some of the courts. They have said that the payment must operate as a preference at the time of its receipt or not at all. So far, we are in accord. They have ruled, however, that this construction compels a computation of assets at the time of payment, mathematically divided by the liabilities, and that the resultant fraction is the

only guide by which the preferential character of the payment can "then" be judged.

They have failed to see that any part payment, which leaves the creditor with the balance of his claim unpaid, necessarily operates, "then", at the time of payment, as a preference, irrespective of the fraction which other creditors might then have received.

When a creditor receives a part payment from an insolvent concern during that four months' period, such payment necessarily endangers the equality of distribution. The creditor receives his payment on account and still remains creditor for the balance of his claim, on which he will receive the same dividend as all other creditors of the same class. Thus, for a portion of his claim, he is paid 100% and for the balance of the claim he receives the bankruptcy dividend. Necessarily, such part payment operates as a preference in that it enables him to receive more than his share.

There may be circumstances under which the payment does not necessarily operate as a preference, for example, when the payment is accepted in full accord and satisfaction and the creditor is left with no balance of the claim to be proved in the bankrupt estate.

Irving Trust Co. v. *Townsend,* 65 Fed. (2nd) 406.

Or when at the time of the part payment, all other creditors have actually received a similar payment.

Templeton v. *Wollens,* 200 Fed. 257.

In that case, although the creditors did not actually receive the contemplated payment, it was in good faith intended that they should, and the preference was held to be non-voidable because the creditor had no reason to believe that a preference was intended. In other

words, if the payments had been made to all, there would have been no preference.

The subject has received intensive examination by District Judge Patterson of the Southern District of New York in the case of *Jentzer* v. *The Viscose Company* (not reported). Not as authority but as the well-considered opinion of a jurist, a copy of his opinion is appended to this brief. The pertinent portion is found on pages 25 to 28.

An appeal was taken from his decision to the Circuit Court of Appeals in the Second Circuit and argument in that court has been postponed, awaiting decision of our case. After discussing all of the authorities, he concludes as follows:

> "I am therefore convinced that where a creditor takes a transfer in partial payment of his claim from the bankrupt while insolvent and within four months of bankruptcy, proportionate payments not being made to all other creditors of the same class, the transaction 'then operates as a preference' within the meaning of section 60 (b), and it is not saved by the fact that the bankrupt at the time retained assets sufficient, if then distributed among his other creditors, to yield as great or a greater percentage to them."

The weight of authority supports this view.

Commerce Guardian Bank v. *Devlin*, 6 Fed. (2nd) 518, C. C. A. 6th;
Matter of Star Spring Bed Co., 265 Fed. 133, C. C. A. 3rd;
Eyges v. *Boylston National Bank*, 294 Fed. 286;
Rubenstein v. *Lottow*, 223 Mass. 227.

In that case, the Supreme Court of Massachusetts, through Chief Justice RUGG, reasoned the matter as follows:

"The question of law which arises in the light of these facts is whether in bankruptcy the preferential character of a transfer of property is to be determined as of the date of the transfer, July 30, 1912, or of the filing of the petition in bankruptcy, October 3, 1912.

We are of the opinion that the judge ruled rightly that the decisive date was that of filing the petition.

As a matter of verbal construction, the governing section of the Bankruptcy Act leads to this conclusion. The pertinent words of the Bankruptcy Act are as in the footnote 1. They express futurity. Whether 'the effect of the enforcement' of the transfer 'will be to enable' one creditor to get a larger percentage of his debt than other like creditors by implication reaches forward to a time when an authoritative distribution can be made. Not until then can the respective percentages be determined with conclusiveness. If the time of the transfer had been the crucial time, the word 'enables' naturally would have been used instead of the words 'will be to enable' found in the Act. The words 'effect of the enforcement of such * * * transfer' also import adjudicated bankruptcy rather than the time of transfer. There can be no occasion for an 'enforcement of * * * such transfer' until a petition in bankruptcy. A transfer of property by a debtor to his creditor apart from statute, takes effect and is enforced automatically at once. There is no fraud at common law about such transfer not exceeding in value the amount of the debt, even though a preference of one creditor over another is thereby produced. Lyon v. Wallace, 221 Mass. 351, 35 Am. B. R. 688, 108 N. E. 1075. It needs no procedure to enforce it, but becomes enforced by the mere transfer. A question touching its enforcement does not arise until adjudicated bankruptcy intervenes. 'The effect' of the enforcement cannot be settled until then. It seems indubitably to follow that its effect must be decided upon conditions as they then exist. The words 'creditors of the same class' betoken adjudicated bankruptcy as the time for the application of the test. These words have no meaning except in

connection with administration in bankruptcy. There are no clases of creditors at common law outside the Bankruptcy Act.

The bankruptcy court necessarily decides what the percentage then due to other creditors of all classes will be. That is one of the essential steps in its procedure. It would seem a strange anomaly to compel that court to try out and decide another question of percentages relating to another time. If the defendant's contention is sound, the bankruptcy court well might be required, in the case of successive preferences, to enter into prolonged investigations as to the precise ratio to each other of the bankrupt's debts and liabilities at numerous different dates within the four months' period preceding the filing of the petition. Such judicial investigations inevitably would cause expense to the public and to the trustee representing the other creditors, and could confer no advantage on the debtor. They could benefit no one except a creditor who had accepted a preference, having reasonable cause to believe that he thereby was securing a preference from a bankrupt debtor. It cannot be presumed that such extreme solicitude at such cost would be manifested by the law for such a creditor, in the absence of words expressing an unmistakable purpose to that end. The words of the Act disclose no such design. On the contrary, they tend in the opposite direction.

The interpretation urged would result in inequality of distribution of the debtor's assets among his creditors. Equality of distribution is one of the fundamental objects of a bankruptcy law. The indebtedness of a business man often gradually progresses from a nascent state of insolvency to the point where a petition in bankruptcy is filed. Beginning with a bare excess of debts over assets, he may go through the gamut to a very large and disproportionate excess in this respect. Preferences during such a period of declining ratio of assets to debts, adjusted according to the theory of the law now put forward, would result in a sliding scale of inequality between the various preferred creditors, as well as inequality between all creditors who have obtained preferences

and the general creditors who depend upon the equality of the law to protect their interests against the alertness of creditors seeking unequal advantages through their own keenness in scenting approaching bankruptcy."

The decisions holding to the contrary are mainly:

Mansfield Lumber Co. v. *Sternberg,* 38 Fed. (2nd) 614, C. C. A. 8th;
Peck & Co. v. *Whitmer,* 231 Fed. 893, C. C. A. 8th;
Haas v. *Sachs,* 68 Fed. (2nd) 623.

In those cases and others supporting the same view, all the emphasis has been placed upon the words "then operating as a preference" in section 60 (b), and no stress has been laid upon the definition of a preference found in section 60 (a). The former section undoubtedly contemplates the actual division of the assets among the creditors at the time of bankruptcy and sets up a standard by which the preferential character of the payment made within four months prior thereto shall be judged by its effect in such actual distribution.

Such a test appeals to our sense of reality and is comparatively easy to apply and is consonant with the main purpose of the Bankruptcy Law. The adverse authorities overlook the effect of the actual distribution of the assets and substitute therefor some imaginary distribution which might take place if at the time of the disputed payment, the entire assets of the bankrupt were distributed among all of its creditors. Such a construction sets up a standard which is based on fiction, a test which would be difficult, if not impossible, to apply and which would run directly counter to the main purpose of the Bankruptcy Law.

The effect of the contrary rule, contended for by the appellant, is best illustrated by the facts in this case.

The sum of $1,000 was not paid in one payment and, if our opponent is correct, each partial payment must be judged by itself. Consequently, when this creditor received the first payment of $250, he took a small portion of his claim—much less than other creditors might have received if there had been an actual distribution at that time—and therefore according to the argument, he received no preference. The same conclusion holds good for the second payment, and the third and fourth and the fifth. If our opponent's reasoning be sound, this creditor might have continued to receive other payments with impunity and as no one of these payments could have given him a greater share than other creditors (if distribution had then been made) he may retain each and every one of them, and a student of mathematics would tell us that he could finally receive some amount approaching, but never quite equalling, 100% of his claim. All this could happen within four months of the bankruptcy and while the concern was insolvent and while the creditor had reasonable cause to believe that a preference was intended. Nevertheless, although he might thus receive almost 100% of his claim and other creditors receive nothing or next to nothing, there would be no voidable preference and he would be permitted to retain every penny he had thus received. Such a conclusion could not have been intended by the framers of the Bankruptcy Act.

But we are told that our interpretation of the Act requires the condemnation of every partial payment received by a creditor within four months of bankruptcy while the debtor is insolvent and that such a construction would render ordinary business impossible.

Ordinary business will not be disturbed. The question of voidable preference does not arise unless bankruptcy occurs within the period and unless the concern is insolvent at the time of the payment and unless

the creditor had a reasonable cause to believe that a preference was intended. We are speaking only of a bankrupt business which has been insolvent for at least four months prior to its bankruptcy. In that business, we are concerned only with those creditors who received money under circumstances which put them on guard as to the insolvent condition and as to the intent of the debtor. We can eliminate from consideration all payments made in the usual course of trade and, in so doing, we would interfere only with those tainted transactions which, on the eve of bankruptcy, threaten to disturb the equality of distribution.

Any construction of the statute which would require the trustee, in order to avoid a preference, to prove not only insolvency at the time of the payment, but also the exact degree of insolvency, would place upon the trustee an insuperable burden and would in effect nullify the purpose of the law.

In our construction, the trustee must prove insolvency at the time of payment, but it is sufficient for our purposes that the liabilities exceed the assets. It is not necessary that we prove with exactitude the discrepancy between the assets and liabilities, so long as it is clear that the latter exceed the former. Under the contrary construction, the trustee would have to prove with precision the value of every asset and the extent of every liability on or about the day when the payment was made. He would have to prove these facts with regard to every such payment. Bearing in mind that we are dealing with a going concern whose assets and liabilities must fluctuate from day to day and from hour to hour, we can see how extremely difficult, if not impossible, it would be for the trustee, after the event, to prove on a day certain the exact value of assets and liabilities. Approximations would not serve the purpose inasmuch as we must prove not only insolvency, but its exact degree. If such a bur-

den of proof were placed on the trustee, in most cases he would be utterly unable to carry it and the "vigilant" creditor would again come into his own as in the days before the present Bankruptcy Act. One of the main purposes of the Act, the equal distribution of assets among creditors, would be frustrated.

Conclusion.

The creditor, by filing its claim in bankruptcy, invited a ruling as to its validity and submitted itself to the jurisdiction of the Bankruptcy Court for the purpose of such ruling. When the trustee asks that the payments be adjudged preferential and proceeds with the proof of its case, it is too late for the creditor to withdraw.

The preferential character of the payments must be judged by their effects on the actual distribution of the assets in bankruptcy. Any other construction of the law would nullify its main purpose, namely, the equality of distribution among creditors.

The decree of the court below should be affirmed.

Respectfully submitted,

CHARLES A. HOUSTON,
Counsel for Respondent.

AARON ROSEN,
ARNOLD A. JAFFE,
of Counsel.

Opinion.

No. 539

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HARRY J. JENTZER, Trustee in Bankruptcy of Yarns Corporation of America, Complainant, *against* THE VISCOSE COMPANY and CHARLES H. LE ROY, Respondents.	In Equity 73-157.

MAXWELL S. MATTUCK, for plaintiff.

SPENCER, ORDWAY & WIERUM (John A. McManus, Samuel H. Ordway, Jr., and Roderick B. Travis, of Counsel), for defendants.

PATTERSON, D. J.:

The suit is to set aside a transfer of property by the bankrupt to the defendant LeRoy, the latter acting in behalf of the defendant Viscose Company, on the ground that the transfer was a voidable preference. While the form of the suit is the familiar one, the facts that gave rise to it are unusual. For convenience the Viscose Company will be referred to as the defendant.

An involuntary petition in bankruptcy was filed against Yarns Corporation of America on September 30, 1931. The transfer complained of took place on June 3, 1931, which is within the time limitation of four months.

The bankrupt was in the yarns business. Its affairs were managed by one Grisman. It had plants in Brooklyn, Allentown, Pa., and Spartanburg, S. C. Some years before it had issued bonds secured by a mortgage on the Spartanburg property and on certain other assets. $244,000 of these bonds were outstanding in 1931. The bankrupt had also become indebted to the defendant in the amount of $500,000 for merchandise purchased. In May, 1930 this liability had been scaled down to $319,000 by a written agreement, the validity of which is assumed by both parties and will not now be re-examined. The defendant refused thereafter to extend any further credit, however, and the bankrupt was hard put to buy its supply of yarn. Until the transfer in question it made no payments in reduction of the $319,000 debt. By the beginning of 1931, the Brooklyn and Spartanburg plants had closed down altogether and the Allentown plant was limping along on a small volume of business. The company was plainly doomed unless there was a radical change for the better.

Early in 1931 one Law of Spartanburg, whose firm had bought and distributed the bond issue and who had been made a director of the bankrupt to represent the bondholders, came to New York and had a series of conferences with Caulfield, credit manager of the defendant. The bankrupt's inability to pay the $319,000 debt was discussed. Law put it to Caulfield that if the amount of the defendant's claim were reduced the claim might be paid and the bankrupt thereby given a new lease on life. These conferences eventuated in a promise by the defendant, evidenced by letter of February 20, 1931, to accept $75,000 in full settlement of the $319,000 debt, provided payment should be made by May 20, 1931, the $75,000 to be raised by the bankrupt either through new funds or through liquidation of assets under Law's direction. Law then turned his attention toward raising new money, but

the bank to which he took the matter found conditions in the company thoroughly unsatisfactory and declined to proceed. On May 8th Law called on Caulfield to report that the $75,000 could not be raised. He said that on examination the bankrupt's accounts receivable had proved to be of low grade, that the business could not be operated successfully. His proposal was that a creditors' committee be formed to wind up the company. Caulfield opposed the suggestion, saying that he favored bankruptcy and might submit a plan later. This marked the end of Law's efforts.

A week or so later Grisman, the bankrupt's president, took up with Caulfield the possibility of clearing off the defendant's claim. He proposed that the bankrupt should assign certain slow assets to a trustee and that on realization of $75,000 for the defendant the $319,000 claim should be deemed discharged. Caulfield accepted the proposal, subject to approval of his superiors. Accordingly an instrument dated June 3, 1931 was executed. It is the transfer made pursuant to this instrument that is assailed as a voidable preference. The instrument provided that the bankrupt would pay $75,000 to the defendant, and that the defendant would accept that sum in full settlement of all claims. As part of the same transaction the bankrupt transferred to LeRoy, acting as trustee, merchandise, accounts receivable and claims as collateral security for its promise to pay the $75,000. LeRoy was to reduce the assets to cash, from the proceeds to pay $75,000 to the defendant, and to return any remaining assets to the bankrupt. In the event that less than $75,000 should be realized, the defendant was to take whatever was realized as payment on account of its $319,000 claim. The assets so assigned to LeRoy in trust for the defendant had a large book value, but on actual realization by LeRoy some months later they brought in only $15,000, and yielded to the defendant a net of

only $13,000. Their fair value on June 3, 1931 was not substantially in excess of $15,000, the sum that LeRoy was able to squeeze out of them. In effect, therefore, the transfer was of assets worth $15,000 as a payment in reduction of the defendant's claim for $319,000.

This transfer left the bankrupt with the real estate and machinery covered by the mortgage to secure the $244,000 bonds, and with about $24,000 in other assets. The greater part of these other assets was in a wholly-owned subsidiary. The bankrupt's business, which had been moribund already for some months, ceased completely. There was a certain amount of activity on the part of the subsidiary, but even here all signs of life ceased shortly before bankruptcy. Prior to bankruptcy the unencumbered assets had been consumed through salaries and other expenses. The trustee in bankruptcy could find assets of only $100.

The bondholders brought suit for foreclosure of the mortgaged property in September, 1931. They eventually realized out of the security some $62,000, a figure which in my opinion also reflects the fair value of the property in June, 1931. This left an unsecured deficit of $182,000, upon which the bankrupt was generally liable and for which the bondholders filed claims in the bankruptcy proceeding.

The bankrupt was hopelessly insolvent when it made the transfer under attack. The defendant makes no more than a faint suggestion to the contrary. The assets, including those mortgaged, were $101,000, against liabilities of $574,000. The liabilities were made up of $319,000 owed to the defendant, $244,000 owed to the bondholders, and $11,000 owed to various others. If the mortgaged properties at $62,000 and an equivalent amount of bonds are omitted, the bankrupt had before the transfer assets of $39,000 and unsecured liabilities of $512,000.

The defendant's position is that the transaction gave it no greater percentage of its claim than was available

to other creditors of the same class, and also that it had no reasonable cause to believe that a preference would be effected. It is pointed out that the transfer covered property worth only $15,000, that this was a payment of only 4.7 per cent on the defendant's claim of $319,000, and that after the transfer the defendant still had unencumbered assets of $24,000, an amount which, if then distributed *pro rata* among creditors other than the defendant, would have given them a payment of 12 per cent. The fact that the other creditors actually received nothing and will get nothing out of the bankrupt estate if the transfer is sustained is said to be immaterial in law.

1. On the point of "greater percentage", the first consideration is the Bankruptcy Act itself. Section 60 (a) defines a preference as the suffering of a judgment or the making of a transfer by the bankrupt while insolvent and within four months of bankruptcy, where

> "the effect of the enforcement will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class obtain."

Section 60 (b) states the conditions under which a preference shall be voidable. Not all preferences are voidable by the trustee. Section 60 (b) provides that a judgment or transfer shall be voidable where made within the four months' period

> "If, at the time of the transfer, * * * the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it * * * shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference."

The Supreme Court of Massachusetts has held that the preferential aspect of a transfer attacked as voidable,

in so far as its effect in giving a greater percentage is concerned, should be judged solely by the situation existing later on at the time of bankruptcy. This construction is the result of placing emphasis on Section 60 (a), with its words of futurity, and of passing by the requirement in Section 60 (b) that the transfer "then" (obviously referring back to the clause "at the time of the transfer") operate as a preference. *Rubinstein* v. *Lottow,* 223 Mass. 227. The District Court of Massachusetts has taken the same view, making the test of "greater percentage" turn not on the ability of the bankrupt at the time of the transfer to pay a like or greater percentage to other creditors, but on whether the others actually will receive as great a percentage out of the bankrupt estate. *Eyges* v. *Boylston Nat. Bank,* 294 Fed. 286.

In other courts the view has been taken that the preferential effect of a transfer must be judged according to its operation at the time the transfer was made and not according to later results. Prominence is given to the clause in Section 60 (b) that the transfer must "then", that is, at the time of the transfer, operate as a preference. From this premise of statutory construction, the conclusion seems to have been drawn that if a transfer leaves the bankrupt with enough to pay a like or greater percentage to other creditors of the same class, there cannot be a preference. The fact that the remaining assets never reach other creditors is disregarded. A line of cases in the Eighth Circuit supports this view. *Peck & Co.* v. *Whitmer,* 231 Fed. 893; *Mansfield Lumber Co.* v. *Sternberg,* 38 Fed. 2nd, 614; *Haas* v. *Sachs,* 68 Fed. 2nd, 623. The state courts in Vermont and Kansas are in accord. *Slayton* v. *Drown,* 93 Vt. 290; *Brittain Drygoods Co.* v. *Bertenshaw,* 68 Kans. 734. See also *Jackson* v. *Steele Mfg. Co.,* 37 S. W. 2nd, 762 (Tex. Civ. App.); *Remington on Bankruptcy,* Sec. 1812. In the *Haas* case, *supra,* it was said:

> "This court has held that whether the effect of the transfer will be to enable the creditor receiving it to obtain a greater percentage of his claim than other creditors of the same class, is to be determined as of the date of the actual transfer, and not as of some future date when later events have altered the assets or liabilities, or when court liquidation may have caused shrinkage of values and other losses" (68 Fed. 2nd, at p. 625).

As matter of statutory construction, it is difficult to see how fair effect can be given to the explicit provisions of Section 60 (b) by the adoption of a standard less favorable to the creditor receiving the transfer. If there is a conflict between Section 60 (a) and Section 60 (b), the latter must be accorded at least equal weight. It is the only provision of the Act that deals directly with voidable preferences. The conclusion must be that under the Bankruptcy Act the preferential effect of a transfer, so far as its voidability is concerned, is to be determined not only by its ultimate result (Section 60 [a]), but also by its immediate result as of the time of the transfer (Section 60 [b]). If it is not more advantageous to the receiving creditor at the time of the transfer than to others of his class, it is not a voidable preference.

But it does not follow from this that a transfer to a creditor of no more than his proportionate share of the debtor's assets cannot be a voidable preference. Where the transfer is merely a payment on account of the claim, the receiving creditor still has the balance of his claim, and as to this unpaid balance he stands on a parity with other creditors who got nothing at the time. It is not accurate therefore to say that he leaves enough for other creditors to give them equal or greater percentages. What he leaves is for himself on the unpaid balance of his own claim, as well as for other creditors. Here the bankrupt owed the defendant $319,000 and other creditors $193,000. It transferred to the defendant property worth $15,000

as a payment on account, reducing the amount of the defendant's claim to $304,000. It still had assets worth $24,000. The defendant did not leave these assets for distribution among other creditors. As to those remaining assets the defendant had rights, to the extent of its unpaid balance of $304,000, as perfect as the rights of other creditors. It could take further payments, pursue creditors' remedies or share in involuntary liquidation. All that happened was that as to $15,000 of its claim the defendant was paid in full, and it still had the balance of its claim for future collection out of the bankrupt's assets. The effect, immediate as well as ultimate, was that the defendant obtained a greater percentage on its claim than other creditors of the same class; it obtained, in other words, a preferential payment.

There is support for this view. In *Commerce-Guardian Bank* v. *Devlin*, 6 Fed. 2nd, 518 (C. C. A. 6), the court declared a payment similar to that in the present case to be a voidable preference. Judge Knappen said (p. 519):

> "We see no merit in the suggestion that the bank got no greater percentage on its own claim (about 48 per cent) than creditors generally would have had, if we accept the estimate of 50 per cent made by the bankrupt's bookkeeper. The bank actually received 100 per cent on $6,300 of its claim, and, if the preferences were upheld would be entitled to receive upon the balance of its claim the same percentage as other creditors of the same class."

A like situation was presented in two of the cases in the Eighth Circuit already cited, *Peck & Co.* v. *Whitmer* and *Haas* v. *Sachs*, and also in the Vermont and Kansas cases adverted to, but in these instances the transactions were treated as non-preferential. In those cases sight seems to have been lost of the fact that the creditor who received the payment on account of his claim retained the balance of his claim for further collection on a parity

with other creditors. The case was considered as if the creditor had dedicated the remaining assets to the other creditors, which was not the fact. The receiving creditor got more than other creditors and it was obvious all along that he would get more if the transfer should be sustained.

Mansfield Lumber Co. v. *Sternberg, supra,* also in the Eighth Circuit, is not subject to this criticism. There the defendant, with a claim of $21,000, took a transfer of property, not as partial payment but in full satisfaction of the claim. The property was worth only $1,600. The defendant thus received only seven per cent of its claim, and its claim was extinguished. The bankrupt retained property sufficient to pay a dividend of eleven per cent to other creditors. The trustee's attack on the transaction as a preference was unsuccessful. It seems manifest that the transaction did not enable the defendant to get a larger proportion of the bankrupt's property than was left for other creditors. The situation was not like a payment merely on account of a claim. Cases somewhat analogous are *Irving Trust Co.* v. *Townsend,* 65 Fed. 2nd, 406, 408 (C. C. A. 2), and *Mart* v. *Emmerson-Brantingham Co.,* 203 Fed. 60 (D. C. Mo.).

I am therefore convinced that where a creditor takes a transfer in partial payment of his claim from the bankrupt while insolvent and within four months of bankruptcy, proportionate payments not being made to all other creditors of the same class, the transaction "then operates as a preference" within the meaning of Section 60 (b), and it is not saved by the fact that the bankrupt at the time retained assets sufficient, if then distributed among his other creditors, to yield as great or a greater percentage to them.

2. Did the defendant have reasonable cause to believe, at the time of the transfer, that the transfer would effect a preference in its favor? Plainly it was aware of the

insolvency of the Yarns Corporation. A creditor of a solvent debtor does not agree to take $75,000 in full satisfaction of an undisputed claim for over four times that amount. In a case where the transfer is only a partial payment, as in this case, it is necessary to show also that the defendant had reasonable cause to believe that it was obtaining a greater percentage of its claim than other creditors. See *Irving Trust Co.* v. *Townsend, supra.* The evidence discloses that the defendant had such reasonable cause. It knew that it was getting part of its own claim paid in full and that the other creditors were then getting nothing. This is not a case where the defendant had reason to believe that the bankrupt was planning to make proportionate payments to all creditors. In such cases reasonable cause to believe that a preference would be effected is lacking. *Smith* v. *Hewlett Robin Co.,* 178 Fed. 271 (C. C. A. 2); *Templeton* v. *Wollens,* 200 Fed. 257 (C. C. A. 2); *In re Varley & Bauman Clothing Co.,* 191 Fed. 459 (D. C. Ala.).

It is true that the defendant was assured by Grisman at the time that the bankrupt had "no creditors of any account other than yourself", and that "the rights of others are not affected". But the defendant already had notice to the contrary. It had known for months that the bankrupt had a large issue of bonds outstanding, and from the correspondence and conferences with Law and Blackford it knew that the firm which had distributed and sponsored the bonds was worried as to the adequacy of the security. Inquiry would have disclosed that the security behind the bonds was altogether inadequate, and the defendant was acquainted with enough facts to put in on inquiry. *Wright* v. *William Skinner Mfg. Co.,* 162 Fed. 315 (C. C. A. 2); *Pender* v. *Chatham Phenix Nat. Bank & Trust Co.,* 58 Fed. 2nd, 968 (C. C. A. 2).

3. The defendant and the bondholders were creditors "of the same class", within the meaning of Section 60

(a). The classes referred to in that section are the four classes of creditors whose priorities in distribution are specified in Section 64—creditors with claims for taxes, creditors with claims for wages, creditors with statutory priorities, and all other creditors. The fact that some creditors are partially secured does not put them in a different class from wholly unsecured creditors. *Swarts* v. *St. Louis Fourth Nat. Bank,* 117 Fed. 1 (C. C. A. 8); *In re Star Spring Bed Co.,* 257 Fed. 176 (D. C. N. J.), affirmed in 265 Fed. 133.

The plaintiff is entitled to a decree adjudging the transfer a voidable preference. Against the defendant Viscose Company there will be a decree for the payment to the plaintiff of all moneys received or applied to the use of that defendant. Against the defendant LeRoy the plaintiff may have an accounting and a direction for transfer of any property not yet turned over by him to the Viscose Company. LeRoy was acting as agent or trustee for the Viscose Company and is under no personal liability for money or property already turned over by him to the party for whom he was acting. *Carson* v. *Federal Reserve Bank,* 254 N. Y. 218. The cause of action charging a transfer in fraud of creditors will be dismissed. The decree will be settled on five days' notice.

(Sgd.) ROBERT W. PATTERSON,
United States District Judge.

November 17, 1934.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 232.

BRONX BRASS FOUNDRY, INC.,
Appellant,

vs.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. PALMENBERG'S SONS, INC.,
Respondent.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE VISCOSE COMPANY AS *AMICUS CURIAE.*

JOHN A. McMANUS,
Counsel for the Viscose Company as Amicus Curiae.

SPENCER, ORDWAY & WIERUM,
Solicitors.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480.

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Appeal from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE VISCOSE COMPANY AS *AMICUS CURIAE.*

Opening Statement.

This brief is submitted with relation only to that part of the decision of the Circuit Court of Appeals which holds that the creditor received a voidable preference (76 Fed. [2] 935, 937).

We shall not argue any question of fact, but shall assume with the learned court below that at the time the appellant was paid $1,000 on account of its claim of $3,000 within four months of the date of the filing of the petition in bankruptcy, the appellant knew that J. R. Palmenberg's Sons, Inc., was insolvent; also that if the assets existing at the time of such payment had been applied to the payment of all the creditors,

the appellant would not have received more than its pro rata share. The question of law to be argued, then, becomes this: Can a creditor who, within four months of bankruptcy, receives from his debtor, who is known to be insolvent, a payment on account of his claim, which payment is not shown to have been a greater percentage of the claim than all other creditors could then have got upon their claims, be forced to surrender that payment as a condition of the allowance of the balance of his claim in the bankruptcy proceeding?

The decision below answered this question in the affirmative upon two grounds: (1) that the payment necessarily resulted in giving the creditor "an advantage over the other creditors" who did not receive a like payment at the same time upon their claims, and (2) that the relevant time to test the question of "an unlawful preference" is not the time of the payment, but some later time not specified, when "the ultimate result" of the payment in relation to the payments received by other creditors in the bankruptcy proceeding is known.

Reason for Interest of the *Amicus Curiae*.

The interest of the Viscose Company in the present case grows out of the fact that by decree of the United States District Court for the Southern District of New York it has been ordered to pay over to a Trustee in Bankruptcy the sum of $13,010.63 as the result of a plenary suit instituted by the Trustee under Section 60(b) of the Bankruptcy Act to set aside an alleged preferential transfer to it from the bankrupt. This decree was entered, although the court found that at the time of the transfer the debtor though insolvent had assets sufficient if then distributed to have paid all its creditors a like or greater percentage of their claims.

In the case at bar the decision expunging the appellant's claim was made under Section 57(g), but inasmuch as the claims which that section affects include, among others, those of creditors who have received preferences voidable under Section 60(b), it would be natural to assume that the de-

cision under Section 57(g) might be applied to the case of a plenary suit by the Trustee to recover an alleged voidable preference under Section 60(b).

The Viscose Company case is now pending on appeal in the United States Circuit Court of Appeals for the Second Circuit, is No. 32 on the October Term, 1935, calendar of that court and is entitled *Harry J. Jentzer, Trustee,* v. *The Viscose Company.* The case appeared on the calendar of that court for argument on October 21st, but the argument was adjourned until December 16th to await the decision of this court in the above-entitled case.

ARGUMENT.

A.

In determining whether a preference results from a payment or transfer the statute expressly provides that the time of the payment or transfer shall govern.

Section 60(b) of the Bankruptcy Act is the controlling statute. Its provisions govern the disallowance of a claim under Section 57(g) and authorize the recovery of a preference where two circumstances concur: (1) where at the time of the transfer the debtor was insolvent and the judgment or transfer "then operate as a preference," and (2) where the creditor "then" had reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference.

Section 60(b), so far as is here material, provides:

> "If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer * * * being within four months before the filing of the petition in bankruptcy the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it * * * shall then have reasonable cause to believe that the * * * transfer would effect a preference, it shall be voidable by the Trustee and he may recover the property or its value from such person."

The phrase in this section "at the time of the transfer" leaves no room for question that the section standing alone refers only to the time of the transaction which is assailed. The court below, in fixing the relevant time to be some time after bankruptcy has intervened, must, we think, have reached this conclusion by placing undue emphasis upon the words of futurity in the clause in Section 60(a) reading "and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Reference is there being made to the enforcement (something which is to take place in the future) of a judgment or transfer. Hence the use of the future tense. To permit that phrase in Section 60(a) to override the clear language of Section 60(b) seems to us to disregard the explicit provisions of Section 60(b) which make it as clear as words can possibly do that the payments to be disturbed are those which constitute a preference at the time they are made.

With the exception of two cases in Massachusetts (*Rubenstein* v. *Lottow*, 223 Mass. 227, and *Eyges* v. *Boylston Nat. Bank*, 294 Fed. 286), we believe it will be found that by the great weight of judicial authority Section 60(b) has been construed to mean exactly what it says, namely, that the preferential effect of a transfer must be judged according to its operation at the time the transfer was made and not according to later results. Hence it has been usually held that, if a transfer leaves the debtor with enough to pay a like or greater percentage to other creditors of the same class, no preference results. *W. S. Peck & Co.* v. *Whitmer*, 231 Fed. 893; *Mansfield Lumber Co.* v. *Sternberg*, 38 Fed. (2) 614; *Haas* v. *Sachs*, 68 Fed. (2) 623; *Slayton* v. *Drown*, 93 Vt. 290; *Brittain Dry Goods Co.* v. *Bertenshaw*, 66 Kan. 734; Remington on Bankruptcy, Section 1812.

In *Peck & Co.* v. *Whitmer*, (C. C. A., 8th Cir.) 231 Fed. 893, 897, the court said:

> "We are of the opinion, however, that by the very language of Section 60(b) the payment must operate

> as a preference at the time it is made, or not at all, and the belief of the creditor as to whether it will constitute a preference or not must be of the time the payment is made."

In *Haas* v. *Sachs*, 68 Fed. (2) 623, at 625, the same court said:

> "This court has held that whether the effect of the transfer will be to enable the creditor receiving it to obtain a greater percentage of his claim than other creditors of the same class, is to be determined as of the date of the actual transfer, and not as of some date when later events have altered the assets or liabilities or when court liquidation may have caused shrinkage of values and other losses."

The quotations just given state the conclusion arrived at. The following quotation from *Slayton* v. *Drown* (*supra*) gives convincing reasons for this conclusion:

> "The fault in the plaintiff's contention that the payment received by the alleged preferred creditor is to be measured by what the other creditors received on the final settlement of the bankrupt estate is apparent when considered in connection with a few familiar illustrations. Suppose that, after the alleged payment, the debtor in the meantime mismanages the business, or successfully conceals a portion or the whole of his property, or a fire destroys his assets, or a world war ruins his business, and that, in the final settlement, the expense of the management and settlement of the estate, involving an expensive litigation, leaves nothing, or only a small part to be distributed among the other creditors, in such circumstances, could it be said that a creditor having received a payment on his debt of no greater percentage than the bankrupt was 'then' able to pay all his other creditors of the same class was a preference, and such fact reasonable ground to believe that such payment would effect a preference even though it should ultimately turn out on the closing up and final settlement of the bankrupt estate that nothing or only a small per cent., much less than the per cent. paid the alleged preferred creditor, was left to pay the other creditors? Can it be reasonably inferred that it was

the intention of Congress in the passage of the Bankruptcy Act to make a payment of the bankrupt to one of his creditors, of a sum not exceeding a per cent. which he was able to pay from his assets subject to the payment of his debts, to each of his other creditors, a preference voidable by the trustee? Must the preferred creditor be charged with a belief that no one would have entertained at the time the payment was made? We think the act was not passed with any such result intended. It cannot be conceived that the act contemplated that the creditor receiving a payment from an insolvent debtor should be charged with reasonable cause to believe that the payment would effect a preference, when, if the exact facts had been known to him at the time the payment was made, they would not have disclosed that the payment was a preference. To establish that the defendant had reasonable cause to believe that the payment would effect a preference, the burden was upon the trustee to show that such was the effect of the payment at the time it was made; for otherwise there would be no basis for the belief.

"In the case at bar the plaintiff's own evidence disclosed that the payment to the defendant was of no greater per cent. of his debt than the insolvent was 'then' able to pay to his other creditors. Indeed, he could have paid to them a much larger per cent. of their debts at that time than he paid to the defendant, while up to the present time no one knows what the bankrupt's estate will be able to pay the creditors on final settlement.

"The portion of the charge excepted to made the recovery to depend, not upon the defendant's having received a greater percentage of the bankrupt's estate than other creditors of the same class would have received if the assets had then been distributed *pro rata* but upon his having received more than other creditors of the same class might ultimately receive on the final settlement of the estate. As we have seen, this was error, and harmful error, and the exception to the charge must be sustained."

B.

The necessary effect of the holding below is to make every payment on account within four months of bankruptcy a preference if the debtor were insolvent. This is contrary to the expressed purpose of Congress.

The court below not only declined to follow these cases declaring that the relevant time was the time of the alleged preferential payment, but, following *Commerce-Guardian Trust & Savings Bank* v. *Devlin,* 6 Fed. (2) 518, 519, held that since the payment on account necessarily resulted in giving the appellant "an advantage over the other creditors," the payment was preferential. It was said to be of no consequence that, at the time the payment on account was made, it did not represent a larger percentage of the appellant's claim than the other creditors would have received had the assets of the bankrupt been then liquidated or distributed. The rule of "advantage over other creditors" is thus substituted for the rule laid down in the statute of "greater percentage."

Before the decision in the case at bar, the Circuit Court of Appeals for the Eighth Circuit (in *Haas* v. *Sachs,* 68 Fed. [2] 623, cited above) had rejected *in toto* the notion that a payment on account was necessarily preferential because it gave an advantage to the receiving creditor. Reference to the opinion at the top of page 625, second column, shows that the Trustee had urged upon the court that no matter what the state of the assets at the time of the transfer was, the payment on account constituted a preference "because the allowance of the balance of the appellant's claim would result in giving him an advantage over other creditors." The court said:

> "If this contention of appellant is sustained, then every payment within four months would be a preference if the bankrupt were insolvent. We think the question is not an open one in this jurisdiction. If

> enough assets remain after a transfer to one creditor to give other creditors as great or greater percentage of their claims, then no voidable preference results."

We think it is not possible to find anywhere in the Act any language indicating that the Congress intended to make every payment on account within four months preferential if the debtor were insolvent. The rule adopted below would go even further and make every such payment voidably preferential because the required element of reasonable cause to believe under such ruling becomes a mere matter of inescapable inference, as we shall show presently.

If Congress had intended such a result it would have provided in plain language that all payments on account by an insolvent debtor within four months of bankruptcy must be surrendered. Such a rule would at least be workable and very simple; but Congress did not say that, and there is no justification for judicial legislation on this point.

Instead of so providing, Congress enacted Section 60(b) and thereby specified precisely the circumstances under which payments by an insolvent debtor to a creditor should be disturbed. We submit that it should be held as a matter of construction that the language of Section 60(b) is to be given its ordinary and usual meaning, namely, that such payments must be surrendered, or may be recovered, only in case the payment operate as a preference at the time it is made and only where the proof shows that the receiving creditor "then" had reasonable cause to believe that the payment would effect a preference. The test of preference laid down in the Act is "greater percentage" and not "advantage."

C.

The result of the ruling below is virtually to render void the reasonable cause to believe requirement of the statute which is generally held of real importance in cases of partial payment.

The doctrine that every payment on account by an insolvent debtor within four months of bankruptcy constitutes

a preference will virtually nullify Section 60(b), which makes reasonable cause to believe that the transfer would effect a preference a prerequisite. This is true because a creditor who receives a payment which other creditors do not receive must surely know that he is getting an "advantage" from which a preference will necessarily result in the event of bankruptcy because he will still have the balance of his claim for filing in the bankruptcy proceeding. Hence he will be charged as a matter of law with reason to believe.

Yet the decisions say that where the payment is only a percentage of the total debt, it is a condition of recovery that the creditor shall have had reasonable cause to believe that he was obtaining a preference, and this cannot be inferred from a mere showing of knowledge of insolvency. The distinction in this connection between a partial payment and a payment in full is clearly expressed in the case of *W. S. Peck & Co.* v. *Whitmer,* (C. C. A.) 231 Fed. 893, at page 896, as follows:

> "Where in any particular case it is shown that a creditor at the time he receives full payment of his debt knows that his debtor is insolvent or has knowledge of such facts, which if investigated would show insolvency, it necessarily results that the creditor had reasonable cause to believe that the enforcement of the transfer would effect a preference. But in a case where the transfer or payment amounts to but a small percentage of the total debt, knowledge of the insolvency of the debtor or facts which if investigated would lead to such knowledge is not conclusive upon the question as to whether the creditor had reasonable cause to believe that the enforcement of the transfer or payment would effect a preference."

This principle was recognized by the court below in *Irving Trust Co.* v. *Townsend,* 65 Fed. (2) 406, 409. (See also *Hershon* v. *Abelson,* 69 Fed. [2] 102, where the court below cited and relied upon the *Peck* case.)

These decisions must fall with the section if the ruling below is to stand. Their principle cannot co-exist with the idea that the creditor receiving a payment on account is to be charged as a matter of law with reason to believe.

In the case at bar no reference to this requirement is found in the opinion of the Circuit Court of Appeals. Yet the claim is ordered expunged under Section 57(g), which refers to Section 60(b). The inference seems to be that the creditor is to be held chargeable as a matter of law with reasonable cause to believe that the payment would effect a preference because of his presumed knowledge that he was getting an *advantage* over other creditors.

Summarizing, we contend that the rule adopted below is contrary to the plain wording of the statute; that it makes every payment on account by an insolvent debtor within four months of bankruptcy voidably preferential and does so regardless of whether or not in fact, or by fair inference from the facts, the creditor at the time of payment had reasonable cause to believe that the payment he received was a greater percentage of his claim than other creditors could then have got.

Section 60(b) of the Bankruptcy Act in its present form has been the law since 1910. It is, to say the least, remarkable that it should at this late date be now interpreted in such a way as to make all payments on account by an insolvent debtor within four months of bankruptcy preferential and voidable by the Trustee, regardless of the state of the debtor's assets at the time of payment. The absence of earlier decisions so holding is in itself good reason to doubt the correctness of such interpretation of the Act.

CONCLUSION.

The decision below on the preference point should be reversed.

Respectfully submitted,

JOHN A. McMANUS,
Counsel for the Viscose Company as
amicus curiae.

SPENCER, ORDWAY & WIERUM,

Stipulation.

IT IS HEREBY STIPULATED AND CONSENTED by and between counsel for both of the parties hereto that the Viscose Company, appellant in a case now pending in the United States Circuit Court of Appeals for the Second Circuit, entitled *Harry J. Jentzer, as Trustee in Bankruptcy of Yarns Corporation of America* v. *The Viscose Company,* October Term, 1935, No. 32, may file the within brief as *amicus curiae* herein with the Clerk of the Supreme Court. Service upon each of the undersigned of a copy of said brief is hereby admitted.

Dated, New York, November 2nd, 1935.

MAXWELL H. GOLDSTEIN,
Solicitor for Appellant.

OTTERBOURG, STEINDLER & HOUSTON,
CHAS. A. HOUSTON,
Solicitors for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 232.—October Term, 1935.

Bronx Brass Foundry, Inc., Petitioner, vs. Irving Trust Company, Trustee.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 10, 1936.]

Mr. Justice Brandeis delivered the opinion of the Court.

J. R. Palmenberg Sons, Inc., was adjudged bankrupt in the federal court for southern New York in August, 1933. In September, Bronx Brass Foundry, Inc., filed its proof of claim. In January, 1934, the Irving Trust Company, trustee in bankruptcy, moved to expunge the claim on the ground that the creditor had received within the four months preceding the bankruptcy, payments on account aggregating $1,000 which were unlawful preferences. The creditor denied the allegations of preference.

On the issue thus raised, several hearings were had before the referee and the evidence introduced clearly indicated that the payments would, upon bankruptcy, effect a preference over other crditors of the same class, and that the claimant had received them having reasonable cause to believe the debtor insolvent. But it left uncertain whether the amount received was more than its pro rata share would have been, if the then existing assets had been ratably distributed among all the then creditors. Before the hearing closed, and in view of an adverse ruling on the admission of evidence, the creditor filed a withdrawal of its claim and left the hearing.

The trustee objected to allowance of the withdrawal, and introduced further evidence, insisting that it was entitled to an adjudication of the question whether the payments made were unlawful preferences. The referee, at the close of the hearing, ordered that the claim be expunged, unless the creditor within 20 days repay the preference to the trustee, with interest from the date of service of the motion to expunge. He said:

"When a creditor files a claim against the bankrupt estate he elects a forum which may hear and determine whether a preference

to him was made. Although judgment of recovery may not be granted, the finding thereon, subject to review, is conclusive as between the parties. It is not intended that a party shall have two trials of the same issue or be permitted to present the same issue to different tribunals for determination. When issue is joined upon the question whether a voidable preference has been received, the creditor may not withdraw of his own motion and thereby avoid such determination as the proof warrants."

The District Court approved the order of the referee. Its judgment was affirmed by the Circuit Court of Appeals, which held that the creditor had received a preference although the proof did not show that at the times of the payments the assets of the debtor were insufficient to pay proportional amounts to all the other creditors, 76 F. (2d) 935. We granted certiorari, 296 U. S. —, because the ruling on the right of the creditor to withdraw its claim appeared to conflict with *Scholl Mfg. Co.* v. *Rodgers*, 51 F. (2d) 971, decided by the Court of Appeals for the Eighth Circuit; and because the ruling on the question of preference conflicted with *W. S. Peck & Co.* v. *Whitmer*, 231 Fed. 893, also decided by that court.

First. The referee was justified in refusing to permit the creditor to withdraw its claim. The Circuit Court of Appeals recognized that ordinarily a plaintiff in equity has, as stated in *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93, the absolute right to dismiss his bill. Its approval of the referee's refusal to permit the creditor to withdraw rested on the ground that the District Court had adopted a rule which authorized the court to refuse, after issue joined, "to permit the plaintiff to discontinue even though the defendant cannot have affirmative relief under the pleadings and though his only prejudice be the vexation and expense of a possible second suit upon the same cause of action;" that this modification of the right of voluntary discontinuance was within the judicial power, since it dealt with procedure; that the rule had been approved by the Court of Appeals; that it was applicable also to bankruptcy proceedings; and that it had been properly applied below. We agree with the reasoning and the conclusion reached.

Second. The ruling of the referee on the question of preference was correct for the reasons stated in *Palmer Clay Products Co.* v. *Brown*, decided this day.

Affirmed.